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IN THE
Supreme Court of the United States

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., BCBSM, INC., BLUECROSS BLUESHIELD OF TENNESSEE, CAREFIRST, INC., FEDERAL MUTUAL INSURANCE COMPANY, HEALTH CARE SERVICE CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY,
Petitioners,

v.

ABBOTT LABORATORIES AND GENEVA PHARMACEUTICALS, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

W. SCOTT SIMMER
HARDY VIEUX
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
1801 K Street, N.W.
Suite 1200
Washington, D.C. 20006
(202) 775-0725

JAMES HARRINGTON
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
800 Boylston, 25th Floor
Boston, Massachusetts 02199
(617) 267-2300

DAVID C. FREDERICK
Counsel of Record
SCOTT K. ATTAWAY
DAVID F. ENGSTROM
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

October 3, 2006

QUESTIONS PRESENTED

Six federal rules of procedure incorporate an "excusable neglect" standard that governs whether a missed deadline should be excused. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), this Court held that "excusable neglect" requires a "flexible" and "elastic" approach to balancing the equities, *id.* at 389, 392, explaining that the factors to be considered include "[1] the danger of prejudice to the [nonmovant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.* at 395. The Court likewise made clear that a party seeking relief need not make a threshold showing of blamelessness, for that would read the word "excusable" out of the phrase "excusable neglect." *Id.* at 395 & n.14.

Although *Pioneer* resolved some of the confusion evinced by lower courts in applying the "excusable neglect" standard, mature and deep conflicts involving nearly all of the circuits have arisen as to two issues presented that are ripe for decision by this Court:

1. Whether a 5-3 circuit conflict (with an additional circuit on both sides) should be resolved as to whether prejudice may be shown merely because a party no longer has to litigate and thereby receives a windfall from the strict enforcement of a deadline without any diminution in its ability to defend the case on the merits.

2. Whether a 5-4 circuit conflict should be resolved as to whether a district court may decline to give any weight to reliance on the normal time for delivery of mail and instead place the risk of late delivery by the postal service entirely on the mailer.

PARTIES TO THE PROCEEDINGS

Petitioners Blue Cross and Blue Shield of Florida, Inc., BCBSM, Inc., BlueCross BlueShield of Tennessee, CareFirst, Inc., Federal Mutual Insurance Company, Health Care Service Corporation, and Mutual of Omaha Insurance Company were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings.

Respondents Abbott Laboratories and Geneva Pharmaceuticals, Inc. were the defendants in the district court proceedings and the appellees in the court of appeals proceedings.

Respondents The Trustees of the Correction Officers Benevolent Association Security Benefits Fund-Retirees, Corrections Officers Benevolent Association Security Benefits Funds Active, Trustees of the Local 445 Freight Division Welfare Fund, Trustees of the Local 445 Construction Division Welfare Fund, and New York City Transit Authority were appellants in the court of appeals proceedings but were the plaintiffs in a separate action initiated in New York that, as part of a multi-district litigation case in Florida federal district court, was consolidated with, *inter alia*, the action initiated in Illinois by the petitioners in this case.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Blue Cross and Blue Shield of Florida, Inc., BCBSM, Inc., BlueCross BlueShield of Tennessee, CareFirst, Inc., Federal Mutual Insurance Company, Health Care Service Corporation, and Mutual of Omaha Insurance Company state the following:

Blue Cross and Blue Shield of Florida, Inc. is a Florida not-for-profit mutual insurance company, and its wholly owned subsidiary, Health Options, Inc., is a Florida corporation. Blue Cross and Blue Shield of Florida has no parent corporation and does not issue stock.

BCBSM, Inc., doing business as Blue Cross Blue Shield of Minnesota, is a Minnesota not-for-profit health services plan corporation. Its wholly owned subsidiaries are: Comprehensive Care Services, Inc., a Minnesota for-profit company; First Plan of Minnesota and HMO Minnesota, Minnesota not-for-profit corporations; and Atrium Health Plan, Inc., a now-dissolved Wisconsin not-for-profit corporation whose assets were sold in 2005, the same year it was dissolved (BCBSM, Inc. remains the successor-in-interest to Atrium Health Plan, Inc., however). Blue Cross Blue Shield of Minnesota is a subsidiary of Aware Integrated, Inc., and no publicly held corporation owns 10% or more of its stock.

The following entities are subsidiaries or affiliates of BCBSM, Inc.:

ADVANCE INSURANCE COMPANY OF KANSAS (AICK)

Affiliated Community Health Network, Inc. (ACHN)

Aware Dental Services, LLC.

AWARE INTEGRATED, INC. (AII)*

BCBSM, INC., dba Blue Cross and Blue Shield of Minnesota (BCBSM)*

BCBSM FOUNDATION, INC., dba Blue Cross and Blue Shield of Minnesota Foundation*

SupportSource, Inc.

Capital Asset Care, Inc., dba Capital Asset Care (CAC)

Care Delivery Management, Inc. (CDMI)*

Comprehensive Care Services, Inc. (CCS)*

Comprehensive Managed Care, Inc., dba Comprehensive Managed Care (CMC)

Employer Provider Network, Inc. (EPNI)

First Plan of Minnesota*

HMO MINNESOTA, dba Blue Plus*

MII, Inc.

MII LIFE, INCORPORATED**

MII Services, Inc., dba ClearConnect

Minnesota Institute of Public Health (MIPH)

Pharmacy Gold, Inc. (PGI)

Prime Therapeutics, Inc. (PTI)

Prime Therapeutics, LLC (Prime LLC)

River Bend Community Health Network, Inc., dba RiverPath Community Health Network*

* Licensee of the Blue Cross and Blue Shield Association.

** Licensee of the Blue Cross and Blue Shield Association (for life products only).

BlueCross BlueShield of Tennessee is a Tennessee not-for-profit corporation, and its wholly owned subsidiaries, Volunteer State Health Plan, Inc., is a Tennessee not-for-profit corporation. Blue Cross Blue Shield of Tennessee also wholly owned another subsidiary, Tennessee Health Care Network, during the spring 2004 opt-out timeframe. Tennessee Health Care Network was formerly a Tennessee not-for-profit corporation. It was dissolved later in 2004, however. Blue Cross Blue Shield of Tennessee has no parent corporation, and no publicly held corporation owns 10% or more its stock.

CareFirst, Inc. is a Maryland not-for-profit corporation, with the following wholly owned subsidiaries: CareFirst of Maryland, Inc. is a Maryland not-for-profit corpo-

ration; Willse & Associates, Inc. is a Maryland corporation; CFS Health Group, Inc. is a Maryland corporation; Patuxent Medical Group, Inc. is a Maryland corporation; Group Hospitalization and Medical Services, Inc. is a not-for-profit company created under federal charter; Capital Care, Inc. is a District of Columbia corporation; Capital Area Services, Inc. is a West Virginia corporation; and Blue Cross Blue Shield of Delaware, Inc. is a Delaware not-for-profit corporation. CareFirst, Inc. has no parent corporation, and no publicly held corporation owns 10% or more its stock.

Federated Mutual Insurance Company is a Minnesota corporation. Federated Mutual Insurance Company has several wholly owned subsidiaries, but none is a publicly traded company. Federated Mutual Insurance Company is a mutual company (it is owned by the policyholders) and has no publicly traded stock.

Health Care Service Corporation is an Illinois Mutual Legal Reserve Company, which includes its Illinois, New Mexico, and Texas Divisions. Health Care Service Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Mutual of Omaha Insurance Company is a Nebraska mutual company with the following wholly owned subsidiaries: United of Omaha Life Insurance Company, United World Life Insurance Company, Exclusive/Healthcare, Inc., Omaha Property and Casualty Company, and innowave, Inc. Mutual of Omaha Insurance Company has no parent corporation. Because Mutual of Omaha Insurance Company is a mutual company, it is owned by its policy owners. Accordingly, it has issued no capital stock and there are no shareholders. Consequently, there is no capital stock owned by any publicly held corporation or any other person.

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Petitioners Blue Cross and Blue Shield of Florida, Inc., BCBSM, Inc., BlueCross BlueShield of Tennessee, CareFirst, Inc., Federal Mutual Insurance Company, Health Care Service Corporation, and Mutual of Omaha Insurance Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's per curiam memorandum opinion (Pet. App. 1a-2a) is unreported (available at 2006 WL 1159646). The district court's order (Pet. App. 3a-15a) is unreported.

JURISDICTION

The judgment of the Eleventh Circuit was entered on May 3, 2006. A timely petition for rehearing was denied on June 7, 2006. *See* Pet. App. 16a. On August 28, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 5, 2006. *See id.* at 65a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 6(b) is at Pet. App. 64a.

INTRODUCTION

This case raises issues of recurring significance to the fair and efficient administration of litigation in the federal courts: what factors must district courts consider in granting relief from a filing deemed to be tardy under the "excusable neglect" standard set forth in six federal rules of procedure. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), this Court held that "excusable neglect" requires a "flexible" and "elastic" approach to balancing the equities. *Id.* at 389, 392. The factors to be considered include "[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the

movant, and [4] whether the movant acted in good faith." *Id.* at 395.

Petitioners are seven large health insurers that sought to opt out of an insufficient class-action settlement reached between plaintiffs' class counsel and respondents Abbott Laboratories ("Abbott") and Geneva Pharmaceuticals, Inc. ("Geneva"). Class plaintiffs alleged antitrust violations from Abbott's written agreement to pay Geneva $4.5 million per month in exchange for Geneva's agreement not to market its FDA-approved generic drug in competition with Abbott's brand name drug. Petitioners were required to send their opt-out notices "by first-class mail in time to be received no later than April 11, 2005," Pet. App. 48a, thus precluding use of a more reliable delivery service and requiring opt-out notices to be sent in time to be received (as opposed to postmarked) by a date certain. Petitioners – which had already been litigating their own non-class claims against respondents in state court for nearly two years – mailed their opt-out notices four days before the due date, but they arrived a few days late. The district court refused to find excusable neglect, and the Eleventh Circuit summarily affirmed.

In applying *Pioneer*, the Eleventh Circuit deepened two substantial conflicts in the courts of appeals. The first concerns what constitutes prejudice to the non-movant by excusing strict compliance with a deadline. The court below found that mere exposure to litigation by petitioners was cognizable prejudice. According to the Eleventh Circuit and two others, loss of the potential windfall a party would have received had the deadline been enforced always constitutes significant prejudice. As five other circuits have held, however, the prejudice analysis properly focuses only on whether excusing compliance with the deadline will cause the non-movant to lose something it would have had if the filing were timely – for example, loss of evidence or access to witnesses, or missing an important deadline – but not facing the same litigation a defendant would have faced but for an untimely filing. The

current articulation of the meaning of prejudice in three circuits thus deviates substantially from the meaning given to that term by five other circuits. Courts regularly assess what constitutes prejudice under the "excusable neglect" standard, and this Court's guidance is needed on that important and recurring issue.

The second conflict concerns whether a district court may decline to give any weight to reliance on the fact that mail typically arrives in the normal course in approximately three days and instead place the risk of late delivery entirely on the mailer. The court below affirmed the district court's holding that petitioners had "assumed the risk" their notices would not arrive on time. Pet. App. 2a, 6a. While that holding is in accord with the law in four other circuits, another four circuits clearly hold that weight should be given to reliance on the fact that mail typically arrives in three days. Indeed, Federal Rule of Civil Procedure 6(e), which adds three days to the response period when a pleading is served by mail, incorporates that same assumption. Although the second question may seem mundane, that is precisely why it is important: reliance on the normal course of mail delivery has enormous practical significance to the day-to-day practice of law. More generally, the erection of a *per se* rule that always visits the vagaries of mail delivery on the mailer who relies on the normal time for delivery exhibits confusion in the lower courts over how to apply *Pioneer*, which plainly held that courts may not merely find "neglect," i.e., a lack of complete diligence, and then deny relief. Rather, even assuming the movant acted with some degree of "neglect" or carelessness, courts must nevertheless conduct a careful, equitable analysis to determine whether it is "excusable."

STATEMENT OF THE CASE

1. Petitioners are seven health insurers that purchased millions of dollars worth of Abbott's brand-name pioneer drug, Hytrin, at prices that were supracompetitive due to respondents' agreement not to compete with each other.

Hytrin's active ingredient is terazosin hydrochloride ("terazosin HCL"), which is used to treat high blood pressure and enlarged prostate – chronic conditions affecting senior citizens and others. Since its introduction in 1987, Hytrin has been one of Abbott's "most important products," a blockbuster drug generating $542 million in U.S. sales in 1998 alone – more than 20% of Abbott's net domestic pharmaceutical product revenues.[1]

Generic drug makers seeking to compete must certify to the Food and Drug Administration ("FDA") that the pioneer drug's (unexpired) patents are either invalid or will not be infringed by the generic. *See* 21 U.S.C. § 355(j). If the pioneer files suit alleging infringement within 45 days, however, then the FDA may not approve the generic for 30 months (unless the generic maker prevails in the litigation in less time). *See id.* The maker of a pioneer drug commonly seeks "add-on" patents, which can "be used as a blockade by the brand-name drug manufacturer to delay generic competition." *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 677 (S.D. Fla. 2004). Even after its primary patents on Hytrin had expired by late 1995, Abbott sought to maintain its patent monopoly through additional patents. *See id.*

Between 1993 and 1996, respondent Geneva filed multiple FDA applications to market generic versions of Hytrin, and Abbott filed multiple patent infringement suits against Geneva. On March 30, 1998, the FDA granted Geneva final approval to market a generic competitor to Hytrin, but Geneva agreed two days later not to compete with Abbott. The FTC investigated the deal and subsequently reached a consent decree with Abbott.[2]

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[1] *See* Compl. ¶ 14, *In re Abbott Labs. and Geneva Pharms., Inc.*, Docket No. C-3945 (FTC filed May 22, 2000) ("FTC Compl."), *available at* www.ftc.gov/os/2000/05/abbottgenevacomp.htm.

[2] *See* Decision and Order, *In re Abbott Labs.*, Docket No. C-3945 (FTC May 22, 2000), *available at* www.ftc.gov/os/2000/05/c3945.do.htm.

According to the FTC, Geneva contacted Abbott on the same day it received FDA approval and announced that it would begin competing against Hytrin unless Abbott paid it not to do so. *See* FTC Compl. ¶ 24. Abbott had a substantial economic incentive to agree, having "forecasted that entry of generic terazosin HCL on April 1, 1998 would have eliminated over $185 million in Hytrin sales in just six months." *Id.* Accordingly, while "Abbott estimated Geneva's revenues from launching generic terazosin HCL at $1 million to $1.5 million per month," Abbott "was willing to pay Geneva a 'premium' over that not to compete." *Id.* ¶ 25. That "premium" amounted to more than 300% of Geneva's expected revenues. Under respondents' April 1, 1998 agreement, Abbott agreed to pay $4.5 million per month for Geneva's agreement not to market its FDA-approved generic until either Geneva prevailed in Abbott's infringement suits or another generic Hytrin competitor entered the market. *See id.* ¶¶ 26-27.

For its part, Geneva entered the agreement despite the fact that, "[b]y early 1998, Geneva, including particularly its CEO, was confident that it ultimately would prevail in its patent infringement dispute with Abbott." *Id.* ¶ 20. (Geneva ultimately did prevail.[3]) "In the words of Geneva's CEO at the time the Agreement was signed, this Agreement represented to Geneva the 'best of all worlds,' because Geneva obtained a risk-free 'monetary settlement on an ongoing basis until the litigation was resolved' and still could market its product exclusively for 180 days after the litigation was over." *Id.* ¶ 29.[4]

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[3] *See Abbott Labs. v. Geneva Pharms., Inc.*, Nos. 96-C-3331 *et al.*, 1998 WL 566884 (N.D. Ill. Sept. 1, 1998) (Abbott patent held invalid), *aff'd*, 182 F.3d 1315 (Fed. Cir. 1999).

[4] The first successful generic applicant gets a 180-period of exclusivity during which the FDA may not approve another generic competitor to the pioneer drug. *See* FTC Compl. ¶ 9 (citing 21 U.S.C. § 355). But the 180-day period "does not begin to run until either the generic is commercially marketed or a court enters final judgment that the patents [on the pioneer drug] are invalid or not infringed." *Id.*

Although a "win-win" agreement for respondents, the FTC determined that Hytrin purchasers "were deprived of the benefits of new competition from Geneva and other generic competitors. Without this lower-priced generic competition, consumers, pharmacies, hospitals, insurers, wholesalers, government agencies, managed care organizations, and others were forced to purchase Abbott's more expensive Hytrin product." *Id.* ¶ 35. Furthermore, "[a] generic product can quickly and efficiently enter the marketplace at substantial discounts, generally leading to a significant erosion of the branded drug's sales within the first year," and "Abbott's forecasts projected that generic terazosin HCL would capture roughly 70% of Hytrin sales within the first six months alone." *Id.* ¶ 36. Respondents' agreement, however, precluded such fast-acting consumer benefits through competition from Geneva. In addition, another generic manufacturer that had satisfied the FDA's requirements for approval by February 1999 "was barred from entering the market because Geneva's 180-day Exclusivity Period had not begun to run." *Id.* ¶ 38. The FTC's investigation led Abbott and Geneva to terminate their agreement early, and Geneva entered the market in August 1999 (followed by others more than 180 days later). By April 2000, the "generic average wholesale price" was "less than 16% of Abbott's Hytrin price." *Terazosin*, 220 F.R.D. at 677-78.

2. Numerous antitrust class actions seeking damages from respondents were filed in (or removed to) the federal courts, which the Judicial Panel on Multidistrict Litigation consolidated in January 2000 in the district court below. The district court granted plaintiffs partial summary judgment in holding that the agreement was a *per se* violation of § 1 of the Sherman Act, but on appeal the Eleventh Circuit reversed and remanded for the district court to perform a more nuanced analysis of the agreement. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1311 (11th Cir. 2003), *cert. denied*, 543 U.S. 939 (2004), *on remand*, *In re Terazosin Hydrochloride Anti-*

trust Litig., 352 F. Supp. 2d 1279 (S.D. Fla. 2005) (again finding *per se* violation of Sherman Act). The district court also certified direct purchaser classes, but the Eleventh Circuit reversed that decision due to apparent intra-class conflicts. *See Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181 (11th Cir. 2003).

Meanwhile, petitioners (together with eight other non-petitioner insurers, collectively referred to below as the "Illinois TPPs," meaning "third-party payers," *see* Pet. App. 4a) separately filed suit against respondents in Illinois state court, alleging violations of state antitrust and unjust enrichment laws. *See id.* at 4a-5a (citing *BCBSM, Inc., et al. v. Abbott Labs., et al.*, No. 03L-009743 (Cook Cty., Ill. Cir. Ct. filed Aug. 12, 2003)). Unlike federal antitrust law, those state laws permit antitrust actions by indirect purchasers like petitioners, which purchased Hytrin from intermediaries such as pharmacies.[5] Petitioners alleged both that respondents' April 1998 agreement was unlawful and that Abbott had delayed entry of generic competition from the market as early as 1996 by instituting sham patent suits. By mid-2005, the Illinois TPPs and respondents were preparing summary judgment briefs in state court. *See* Dist. Ct. 6/28/05 Tr. 51.

While petitioners' Illinois action was proceeding ahead, the district court in 2004 certified 17 state classes of indirect purchaser plaintiffs, which included petitioners and the eight other Illinois TPPs. *See Terazosin*, 220 F.R.D. at 675. Respondents appealed, claiming intra-class conflicts in that end users of Hytrin would prefer a finding that all damages were passed through to them via higher insurance premiums, while the insurers would prefer a finding

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[5] *Compare Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (no antitrust standing for indirect purchasers under federal antitrust laws), *with California v. ARC America Corp.*, 490 U.S. 93, 105-06 (1989) (no preemption of state indirect purchaser statutes by *Illinois Brick*).

that they passed on no such damages.[6] Petitioners' non-class action in Illinois, on the other hand, presented no such certification problems.

3. Faced with the possibility of a third court of appeals reversal, class counsel for plaintiffs reached a settlement with respondents covering the indirect purchaser classes, which the district court preliminarily approved on March 7, 2005. After deducting attorneys' fees, the allocation for all TPPs was less than $15 million – an amount representing less than one month's worth of Abbott's alleged illegal Hytrin profits. *See* Appellants' Br. 9-10 (Sept. 20, 2005). In contrast, petitioners' 1998-99 expenditures on Hytrin reflect recoverable damages in excess of $16 million, before trebling. *See id.* at 15 n.7. Thus, if petitioners were required to share in the proceeds of the class settlement, they would receive a tiny fraction of what they stood to gain in their ongoing Illinois litigation.[7]

Class-action settlements commonly incorporate a so-called "blow provision," which permits the settling defendants to rescind (or "blow") the settlement in the event that opt-out claims exceed a certain threshold. Blow provisions thus minimize the risk that settling defendants will be required both to pay the settlement monies yet nevertheless face substantial liabilities to opt-outs whose claims the negotiated settlement amount was intended to

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[6] Respondents also claimed that Illinois and New York law prohibit indirect purchaser class certifications. *See, e.g.*, 740 Ill. Comp. Stat. 10/7(2); *Asher v. Abbott Labs.*, 737 N.Y.S.2d 4, 4 (App. Div. 2002).

[7] Plaintiffs' expert opined that indirect purchaser class damages "could amount to as much as $141 million," while the gross settlement payable by respondents came to 19% of that amount, or $28.7 million. Indirect Purchaser Plaintiff Classes' Motion for Final Approval at 17-18 (June 15, 2006) ("IPP Final Approval Mot."). Plaintiffs' class counsel sought to justify the reduced amount of the settlement: "[I]f the IPP cases did not settle and the Eleventh Circuit reversed the Class Certification Order, the value of the IPP cases would have been greatly diminished." *Id.* at 16.

extinguish.[8] The settlement agreement here likewise included a blow provision (which was originally filed under seal but later unsealed while the case was on appeal) under which respondents could rescind the settlement if there were excessive opt-outs.

The blow provision here, however, expressly *excluded* any Illinois TPP opt-outs from counting toward the blow threshold, thus *precluding* respondents from rescinding the settlement based on petitioners' opt-outs.[9] Plainly, if the negotiated settlement amount had included monies allocated to the Illinois TPPs' "significant claims,"[10] then respondents would not have agreed to exclude those opt-outs from the blow threshold and risk paying the settlement monies allocated to those claims, yet still face liability on those same claims in the Illinois case. This point was made explicitly by plaintiffs' class counsel[11] and implicitly by Abbott's counsel.[12] Likewise, in urging the fil-

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[8] *See In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 365-66 (S.D.N.Y.), *aff'd*, Nos. 95-9209 *et al.*, 1996 WL 739258 (2d Cir. Dec. 27, 1996) (judgment noted at 107 F.3d 3).

[9] *See* Pet. App. 20a (opt-out threshold calculated by "excluding any TPP Opt-Out Payments attributable to any Illinois TPPs that opt out").

[10] IPP Final Approval Mot. at 25 ("[Illinois TPPs] are virtually the only TPP opt-outs with potentially significant claims.").

[11] *See* IPP Final Approval Mot. at 3 ("The anticipated exclusion of the Illinois Case TPPs . . . from the IPP classes was factored into the settlement negotiations, including the amount of the Proposed Settlement and the conditions for termination of the Proposed Settlement by Defendants."); *id.* at 25 ("The[] [Illinois TPPs'] exclusion from the settlement was anticipated by Class Counsel and was factored into the negotiations of the settlement amount."); *id.*, Ex. 3, Decl. of Class Counsel Geoffrey M. Horn ¶ 34 ("Another factor plaintiffs considered during settlement negotiations was the value of claims similar to the classes' claims brought by a group of individual TPPs in Illinois state court ('the Illinois TPPs'). I personally spent a great deal of time trying to determine the value of the absence of the Illinois Case TPPs from any potential settlement of [this] action.").

[12] Dist. Ct. 6/28/05 Tr. 188 (counsel for Abbott: "it was perfectly possible the [Illinois TPPs] were opting out" due to their "strong interest

ing of the settlement agreement, the district court voiced its expectation that the Illinois TPPs would opt out.[13]

4. Because the blow provision was filed under seal (as "Rider A") by respondents and plaintiffs' class counsel, petitioners did not know that their opt-outs would not count toward the blow provision threshold. The settlement agreement itself, however, stated that a blow provision existed and that the deadline for respondents to exercise any rights under it was May 9, 2005, or 28 days after petitioners' opt-out notices were due on April 11, 2005.[14]

The TPP opt-out form required that TPPs must "send it by first-class mail in time to be received no later than April 11, 2005." Pet. App. 48a.[15] Petitioners were thus required to send their opt-out notices via a specific mode of delivery (first-class mail) rather than a private mail carrier or overnight mail; and the deadline was not a postmark date but an instruction to "send it" enough in advance so that it could be "received no later than April 11, 2005," *id.* – possibly exposing would-be opt-outs to the vagaries of first-class mail delivery.

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in pushing ahead" in Illinois); Dist. Ct. 6/29/05 Tr. 97 (counsel for Abbott: "we agreed to have a settlement with these [indirect purchaser] classes and to see what happened with the opt-out, but we weren't requiring [the Illinois TPPs] to be a participant in the settlement").

[13] *See, e.g.*, Dist. Ct. 2/4/05 Tr. 35 ("so that [counsel for the Illinois TPPs] can exercise his opt out rights and proceed with his trial, we need to get the notice out").

[14] *See* Settlement Agreement at 19 ("To terminate this Settlement Agreement on the basis that the Third Party Payer Threshold Amount (as that term is defined in Rider A) has been exceeded, Defendants shall provide written notice (which may be by facsimile or electronic mail) to IPPs' Co-Lead Counsel by 5:00 p.m. Pacific time on May 9, 2005.") (attached as Exhibit 1 to Indirect Purchaser Plaintiff Classes' and Plaintiff States' Motion for Preliminary Approval of Settlement Agreement (Mar. 3, 2005)).

[15] By comparison, the "Proof of Claim" used to claim a distribution from the settlement fund only had to be "*postmarked* by July 15, 2005." Pet. App. 52a (emphasis added).

The TPP opt-out form also required a "separate notice of exclusion" for each TPP, along with that party's address and taxpayer identification number, or EIN. For petitioners, this meant compiling thousands of EINs, since each self-funded employer health plan organized under an insurer must have its own EIN. *See* Dist. Ct. 6/28/05 Tr. 14.

Finally, the opt-out form requested (though did not expressly require) that opt-outs submit a certified breakdown of the "Amounts paid in each of the 18 states for Hytrin® and/or generic terazosin hydrochloride during the period January 1, 1998 to December 31, 1999, based on records maintained by the Class Member." Pet. App. 50a (footnote omitted). The opt-out notice stated this was "for the parties to determine what effect, if any, the Opt-Out's exclusion has on the termination contingencies," i.e., the sealed Rider A blow provision. *Id.* at 46a. An opt-out that failed to provide those requested payment data risked subjecting the objector opting out of the settlement to "discovery via subpoena or other legal process." *Id.*

The opt-out form did *not*, however, reveal that respondents did not even need to know whether any of the Illinois TPPs had opted out in order to determine whether their blow threshold had been reached. Petitioners therefore provided the requested drug purchase data, sifting through millions of individual prescription transactions, all within the 35 days provided by the notice of settlement. *See* Dist. Ct. 6/28/05 Tr. 19.

After compiling the thousands of EINs required by the opt-out form, and the voluminous drug purchase data requested by the form, all 15 of the Illinois TPPs submitted their opt-out materials by first-class mail at the main Washington, D.C. post office at 11:06 p.m. on Thursday, April 7, 2005, four days before the April 11 deadline. Although the 15 packages were mailed together and destined for the same West Palm Beach, Florida post office box, they arrived in staggered fashion over the next four to eight days. Of the seven petitioner opt-outs, two arrived on April 13 (two days late, six days after mailing)

and five arrived on April 15 (four days late, eight days after mailing). Seven of the non-petitioner Illinois TPP opt-outs arrived a few hours after midnight on April 12.[16] The remaining opt-out arrived on time.

5. The district court denied petitioners' motion to excuse the late arrival of their opt-out notices pursuant to the "excusable neglect" standard in Federal Rule of Civil Procedure 6(b)(2), as interpreted by this Court in *Pioneer*. *See supra* pp. 1-2 (setting out *Pioneer* factors). First, the court found that petitioners had "assumed the risk" of a tardy submission by using "regular first class mail instead of an expedited service such as priority mail." Pet. App. 6a. The court rejected petitioners' reliance on the fact that mail typically arrives in the normal course in approximately three days. *See id.* at 7a & n.4.

Second, the court found that "the length of the delay was not substantial," *id.* at 7a-8a, thus necessarily finding that there was no impact at all on judicial administration of the proceedings before it. *See Pioneer*, 507 U.S. at 395 (courts should consider "the length of the delay and its potential impact on judicial proceedings"). Nevertheless, the court found that allowing the late-received opt-outs "would prejudice the Defendants in that they would be required to litigate against entities who inexcusably failed to submit timely opt-out[] forms." Pet. App. 7a-8a. The court thereby found that mere exposure to the ongoing Illinois state court litigation was cognizable prejudice under the excusable neglect standard. The court also found prejudice in that respondents "entered into the IPP settlement in order to achieve a full and complete resolution

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[16] Those seven opt-outs were originally marked timely by the claims administrator and are not at issue here. In fact, they arrived just hours late, at 4:11 a.m. on April 12. Although the claims administrator did not even pick up any mail delivered on April 11 until 6 a.m. the morning of April 12 (when he marked everything in the post office box as having been received the day before), the district court nevertheless refused to find excusable neglect. *See* Order at 2 (Feb. 28, 2006). That holding is now on appeal to the Eleventh Circuit.

of all IPP claims, and the parties are entitled to hold potential class members to the deadlines that were the product of vigorous negotiations." *Id.* at 8a. The court did not identify any prejudice other than having to continue litigating the nearly two-year-old Illinois case.

Finally, the district court adopted the supposition advanced by respondents, unsupported by any evidence, that "the Court could reasonably conclude that the Illinois TPPs waited until the last minute intentionally with the hopes of minimizing the chances that the Defendants might seek to terminate the IPP settlement on April 11, 2005, based on their exclusions." *Id.* The court offered no explanation for how transmitting petitioners' opt-outs to arrive on or about April 11 could have affected respondents' exercise of their blow rights by the settlement agreement's *May 9* deadline (even assuming the Illinois TPP opt-outs counted toward the blow threshold, which they did not).[17]

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[17] The district court's July 8, 2005 opinion also stated that "the Illinois TPPs have offered no evidence to support a finding that they acted in 'good faith.'" Pet. App. 8a. The opinion acknowledged the Illinois TPPs' counsel's argument that the voluminous and detailed opt-out forms were not sent until April 7, 2005, because of "the time and effort that it took to gather all of the documentation" required by the forms. *Id.* at 8a n.6. The opinion stated, however, that "there is no record evidence on that issue" and that, "[f]urther, it appears that much of the documentation that was being gathered was not even necessary for the Illinois TPPs to opt out." *Id.* To address the court's concerns, petitioners had filed a timely reply brief on June 30, 2005. Petitioners noted that "the detailed information requested in the Request for Exclusion, including drug purchase data broken down by year and then further broken down by each of eighteen states," "was the heart of the opt out process" so that respondents could know in time for the May 9 blow deadline whether the Illinois TPP opt-outs triggered the blow threshold. Reply Br. of Illinois Plaintiffs at 5-6 (June 30, 2005). Petitioners' affidavits showed that generating both the required EINs and the requested drug payment data together caused "the Illinois [TPPs] to expend over 1,090 hours of work (140 hours by their data experts and 950 by their counsel) assembling data, EIN's, and preparing the opt-out packages, running over 3,985 pages." *Id.* at 6-7.

6. Petitioners appealed. After briefing but before decision, petitioners learned from plaintiffs' class counsel that the blow provision in Rider A in fact excluded the value of the Illinois TPP opt-outs from the blow threshold. Petitioners sought supplemental briefing on the effect of the blow provision, which the court of appeals denied "without prejudice to [petitioners'] right to file a Fed.R.Civ.P. 60(b) motion in district court." Order (Dec. 29, 2005).[18]

The Eleventh Circuit affirmed the district court's order in a brief, unpublished opinion. After briefly reciting the procedural history of the case, the court stated: "We review the district court's decision for abuse of discretion. After considering the parties [*sic*] briefs and the relevant portions of the record, we find no such abuse." Pet. App. 2a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's summary affirmance of the district court's decision[19] both fundamentally misapprehends

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At the June 29, 2005 continuation of the fairness hearing, the district court (in the absence of counsel for petitioners) announced that it intended to deny petitioners' motion in a written order to follow. In its July 8, 2005 order, the court denied leave to file petitioners' reply brief "in light of the fact that the Court orally announced its ruling denying the Illinois TPPs' motion for leave to file a late opt-in at the fairness hearing, and the Illinois TPPs fail to provide any authorities or arguments justifying the reversal of the Court's ruling." Pet. App. 14a-15a. Thus, while the court denied leave to file the reply brief, it also actually considered and rejected petitioners' arguments and affidavits.

[18] The district court subsequently ordered the blow provision unsealed. *See* Dist. Ct. Docket Entry 1671 (Feb. 24, 2006).

[19] The court of appeals' summary affirmance of the district court's judgment is no bar to review. *See, e.g., United States v. Flores-Montano*, 541 U.S. 149, 151 (2004) (reviewing summary affirmance); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 35 (1994) (same); *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 607 (1991) (same); *Miller v. Florida*, 482 U.S. 423, 428 (1987) (same). In that event, "one simply ascribes to the court of appeals the rationale employed by the district court." Robert L. Stern, *et al.*, *Supreme Court Practice* 240 (8th ed. 2002); *see id.* at 239-40 ("Of course, a district court decision may be cited and quoted for conflict purposes where the deci-

this Court's teaching in *Pioneer* and exposes conflicting views among the courts of appeals on two questions of law that are critical to judicial administration of six Federal Rules of Civil, Criminal, and Appellate Procedure and the Bankruptcy Rules that incorporate the "excusable neglect" standard.[20]

The first question is whether a settling party experiences any "prejudice" cognizable under the "excusable neglect" standard merely by having to continue to litigate a case that would have been snuffed out by strict application of the opt-out date. A clear majority of circuits has held that a non-movant's windfall from a missed deadline is not cognizable prejudice; rather, to constitute prejudice, the non-movant must be in a worse position if the deadline were excused than if it had been met.

The Eleventh Circuit also deepened a second conflict of recurring significance by holding that a litigant's reliance on the normal course of first-class mail delivery gets no weight in assessing excusable neglect under *Pioneer*'s equitable balancing test. In doing so, the court squarely contravened *Pioneer*'s teaching that the lower courts may not simply stop at a finding of neglect; if neglect were never excusable, then the "excusable neglect" standard would be meaningless. Both issues are of recurring significance to litigants.

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sion has been summarily affirmed, without opinion, by a court of appeals."). "A contrary approach would risk effectively immunizing summary dispositions by courts of appeals from our review." *Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam).

[20] The "excusable neglect" standard is found in Federal Rules of Civil Procedure 6(b), 13(f), and 60(b); Federal Rule of Criminal Procedure 45(b); Federal Rule of Appellate Procedure 4(a) and (b); and Bankruptcy Rule 9006(b)(1). *See Pioneer*, 507 U.S. at 387 n.3; *see also Stutson*, 516 U.S. at 197-98 (holding that *Pioneer* applies to Federal Rule of Appellate Procedure 4(b)). The lower courts have consistently held that this Court's *Pioneer* analysis applies to all six. *See, e.g., Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 & n.6 (2d Cir. 2003); *Pratt v. Philbrook*, 109 F.3d 18, 19 & nn.1, 2, 3 (1st Cir. 1997).

I. THE ELEVENTH CIRCUIT DEEPENED AN EXISTING CONFLICT OVER WHETHER A DEFENDANT IS PREJUDICED MERELY BY HAVING TO LITIGATE CLAIMS IT WOULD HAVE FACED BUT FOR A MISSED DEADLINE

A. Respondents Suffer No Cognizable Prejudice From Litigating Claims They Would Have Faced But For A Missed Deadline

Because respondents were defending against claims by petitioners in Illinois state court, the strict enforcement of the opt-out deadline in this case had the effect of giving respondents a windfall: they could assert that, as non-opted-out members of the class, petitioners could not bring the Illinois action. The court below held that respondents therefore suffered "prejudice" under the excusable neglect standard by having to continue to litigate those Illinois claims. By holding that the risk of continuing litigation constitutes cognizable prejudice under the excusable neglect standard, the court applied an erroneous legal rule in conflict with numerous judicial decisions.

Under the expansive reasoning adopted by the Eleventh Circuit, prejudice exists in virtually every case. When a party misses a deadline and loses certain rights, the other parties receive a windfall. It is illogical to consider the loss of that windfall to be an injury, damage, or detriment constituting "prejudice" in any meaningful sense of that word. To "prejudice" another, however, means to cause them injury or detriment – not to remove a fortuitous benefit. *See American Heritage Dictionary* 1428 (3d ed. 1992) ("To affect injuriously or detrimentally by a judgment or an act."); *Webster's Third New International Dictionary* 1788 (2002) ("to injure or damage by some judgment or action"). Prejudice in this context must require that the defendant lost a right or option it would otherwise have had *if the deadline had been met.* For example, genuine prejudice might be found where the delay, if excused, would cause the non-movant to suffer a loss of evidence or access to witnesses, or to miss an important

deadline.[21] In those instances, the non-movant would not be in the same position than if the deadline had been met.

Here, on the other hand, the court identified no loss to respondents of any right they would have had but for the missed deadline, and there is none. Instead, respondents lost only the windfall of not having to defend against petitioners' Illinois claims. The court's unsupported statement that "the parties are entitled to hold potential class members to the deadlines that were the product of vigorous negotiations" adds nothing to its prejudice analysis. Pet. App. 8a. Respondents lost no rights under the settlement agreement that they would have had if petitioners' opt-outs had arrived on time, and neither respondents nor the court below identified any such prejudice.

The court's finding of prejudice here was particularly egregious given that the settlement amount was based, at least to some significant degree, on the expectation that petitioners (as well as the other Illinois TPPs) would opt out. Respondents thus receive a double windfall: not only are they freed of their potential liabilities to petitioners in the Illinois case, but they gain the additional benefit of having terminated the class claims without paying much if anything for the value of petitioners' claims. Other indirect purchaser class members will also suffer because their recovery will be diminished to the extent of petitioners' claims to the settlement fund.[22]

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[21] *See Donald v. Cook Cty. Sheriff's Dep't*, 95 F.3d 548, 557-58 (7th Cir. 1996) (finding prejudice where non-movant plaintiff lost the ability to correct defects in his choice of defendants within the statute of limitations due to defendant's long delay in answering the complaint).

[22] Regardless of what happens here, moreover, respondents will still have to litigate the same claims against the Illinois TPP whose opt-out form, mailed at the same time as petitioners' forms, arrived on time.

B. Federal Courts Are Deeply Divided On Whether Simple Exposure To Litigation Of A Claim Constitutes Cognizable Prejudice Under The Excusable Neglect Standard

1. The Third and Seventh Circuits (and arguably the D.C. Circuit, *see infra* p. 21) are aligned with the Eleventh Circuit's holding that exposure to litigation that a defendant would have faced but for a missed deadline constitutes prejudice under the excusable neglect standard. In *Chrysler Credit Corp. v. Macino*, 710 F.2d 363 (1983), the Seventh Circuit affirmed a district court's refusal to vacate a default judgment pursuant to Rule 60(b). The court reasoned that "reopening the entry of default would have prejudiced Chrysler Credit, the party without fault, by requiring it to devote time and money to additional litigation." *Id.* at 367. Thus, the Seventh Circuit's approach to the issue clearly contemplates that additional litigation, without more, constitutes cognizable prejudice under the excusable neglect standard.

The Third Circuit has also held that simple exposure to claims the non-movant would have faced but for a tardy filing constitutes cognizable prejudice within the meaning of *Pioneer*. In *In re Orthopedic Bone Screw Products Liability Litigation*, 246 F.3d 315 (2001), the court found no prejudice in allowing a late proof of claim because the defendant's total liability had been capped and would not be affected by the inclusion of additional class members. *See id.* at 323-24.[23] The court then explained, however, that a case involving "expansion of the plaintiff class" by permitting late-filed claims against an uncapped settlement fund "will be to the detriment of the defendant." *Id.* at 323.

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[23] *See also In re Cendant Corp. PRIDES Litig.*, 233 F.3d 188, 196 (3d Cir. 2000) (no prejudice from late proof of claim where defendant's total liability is capped regardless of the number of claimants); *In re O'Brien Envtl. Energy, Inc.*, 188 F.3d 116, 128 (3d Cir. 1999) (no prejudice from creditor's late-filed claim where bankrupt debtor had "already planned to pay" the claim under the express terms of the reorganization plan).

Subsequently, the Third Circuit applied that reasoning squarely to hold that prejudice follows from the loss of a windfall that would have been gained if the tardy filing were not excused. In *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 92 F. App'x 890 (2004), the settlement agreement permitted "initial" and "downstream" opt-outs, the difference being that only initial opt-outs could sue for punitive damages. *Id.* at 892. The court affirmed a finding of prejudice and declined to permit a late-filed initial opt-out because doing so would "subject [the defendants] to significantly greater potential damages" and cause them to "lose this benefit of the settlement agreement." *Id.* at 893-94.

Under the approach of the Third, Seventh, and Eleventh Circuits, therefore, mere exposure to litigation a defendant would have faced but for a missed deadline is prejudicial. Although those circuits mandate that prejudice be found in virtually all cases, a clear majority of circuits has rejected that rule.

2. The First, Fourth, Fifth, Ninth, and Tenth Circuits have each held that exposure to litigation and the possible payment of claims that the non-movant would have faced but for an untimely filing is not cognizable prejudice under the excusable neglect standard. In *Pratt v. Philbrook*, 109 F.3d 18 (1997), the First Circuit rejected a Rule 60(b) motion for relief from a default judgment, explaining: "Of course, it is always prejudicial for a party to have a case reopened after it has been closed advantageously by an opponent's default. But we do not think that is the sense in which the term 'prejudice' is used in *Pioneer*." *Id.* at 22. Rather, the type of prejudice cognizable under *Pioneer* must consist of a newly created difficulty in litigating the case "in the sense, for example, of lost evidence." *Id.*

In *Bateman v. United States Postal Service*, 231 F.3d 1220 (2000), the Ninth Circuit reversed the district court's finding that a Rule 60(b)(1) movant had failed to show "excusable neglect" within the meaning of *Pioneer* where

an overseas family emergency led to an untimely filed opposition to a summary judgment motion and entry of default. The *Bateman* court explained:

> The prejudice to the Postal Service was minimal. It would have lost a quick victory and, should it ultimately have lost the summary judgment motion on the merits, would have had to reschedule the trial date. But such prejudice is insufficient to justify denial of relief under Rule 60(b)(1).

Id. at 1224-25. *See also TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001) ("It should be obvious why merely being forced to litigate on the merits cannot be considered prejudicial for purposes of lifting a default judgment. For had there been no default, the plaintiff would of course have had to litigate the merits of the case, incurring the costs of doing so. A default judgment gives the plaintiff something of a windfall by sparing her from litigating the merits of her claim[.]").

Finally, even before this Court's decision in *Pioneer*, the Fourth, Fifth, and Tenth Circuits made clear that simple exposure to additional litigation does not constitute prejudice in determining whether to grant relief from a tardy filing. *See Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988) (per curiam) ("[W]e perceive no disadvantage to Augusta beyond that suffered by any party which loses a quick victory."); *Hibernia Nat'l Bank v. Administracion Cent. Sociedad Anonima*, 776 F.2d 1277, 1280 (5th Cir. 1985) ("[T]he mere possibility of prejudice from delay, which is inherent in every case, is insufficient to require denial of a 60(b)(1) motion."); *In re Four Seasons Sec. Laws Litig.*, 493 F.2d 1288, 1289, 1291 (10th Cir. 1974) ("no prejudice suffered from the enlargement of time" to opt out in order that movant "could pursue potential individual claims in private litigation").

C. The Divergent Approaches Of The D.C. Circuit Underscores The Pervasive Confusion On The Meaning Of Prejudice Under *Pioneer*

Decisions of the D.C. Circuit both support and reject the majority approach to defining prejudice under the *Pioneer* standard, thus signaling that the confusion among the lower courts is real and in urgent need of this Court's clarification.[24] In *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835 (2006), the D.C. Circuit reversed the district court's refusal to allow a late-filed Rule 60(b) motion seeking to quash a writ of execution against diplomatic residences owned by the Congo. The court stated that "[p]rejudice under Rule 60(b)(1) appears typically and properly to contemplate costs that reconsideration of the final judgment would inflict on the non-moving party *independent of the chance of reversal.*" *Id.* at 840. The court thus declined to interpret *Pioneer*'s excusable neglect standard as "making simple exposure to adjudication a qualifying form of prejudice under Rule 60(b)(1)." *Id.* While the court distinguished *Pigford v. Johanns*, 416 F.3d 12 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1581 (2006), those "distinctions" underscore great confusion.

Pigford affirmed the district court's rejection of late-filed claims of African-American farmers against a settlement fund in a class action alleging discrimination by the United States Department of Agriculture. Applying the *Pioneer* factors, the court found that the prejudice to the government of allowing the late-filed claims militated against finding "excusable neglect" because the government would face increased liability if the opt-in claims were allowed. *See* 416 F.3d at 21-22. This "expansion" of liability, the court concluded, was significant prejudice within the meaning of the *Pioneer* standard. *Id.* at 22.

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[24] *See, e.g., Scarborough v. United States*, 431 U.S. 563, 567 & n.4 (1977) (certiorari granted because of "split among the circuits," one circuit being noted as "ha[ving] an intra-Circuit conflict").

The creditors in *FG Hemisphere*, however, *also* faced increased liability in the event that the default was lifted – namely, that the Democratic Republic of the Congo would successfully quash the writs of execution sought against the contested properties. By glossing over the rationale of its earlier decision in *Pigford*, the court in *FG Hemisphere* did not explain how one could square its holding that exposure to liability flowing from the lifting of a default judgment is *not* cognizable prejudice under *Pioneer*, and its holding in *Pigford* that precisely such an "expansion of liability" *is* cognizable prejudice. Nor did the D.C. Circuit explain why the class-settlement context of *Pigford* implicated different concerns from the default judgment in *FG Hemisphere*, apart from its cursory explanation that the government was entitled to the "benefit" of its "bargain" but without identifying how the government would have lost any right under the agreement by excusing the late filing. The divergent approaches of the D.C. Circuit in *FG Hemisphere* and *Pigford* thus highlight the conflict among the circuits about the meaning of prejudice under *Pioneer*.

The time is ripe for the Court to provide clear guidance on this important and recurring question.

II. THE ELEVENTH CIRCUIT DEEPENED AN EXISTING CONFLICT OVER WHETHER RELIANCE ON A "NORMAL" OR "USUAL" TIMEFRAME FOR DELIVERY OF MAIL CAN CONSTITUTE EXCUSABLE NEGLECT

A. The Court Below Improperly Gave No Weight To The Fact That Petitioners Mailed Their Opt-Outs Within The Normal Timeframe For The Delivery Of Mail

The court below held that petitioners "assumed the risk" that their opt-outs would not make it from Washington, D.C. to West Palm Beach, Florida, within four days, based on its conclusion that there is no "legally cognizable rule assuming that mail will reach its destination within three mailing days." Pet. App. 6a-7a & n.4. Although the court acknowledged that "some case law has referred to a

general standard of three days for mailing," it found that "there is no set rule that insulates parties whose papers are not delivered within three days from suffering the consequences of their own actions." *Id.* at 7a n.4.[25]

The requirement of a "set rule that insulates" petitioners from the vagaries of first-class mail delivery in order for them to be eligible for relief makes clear that the court approached the issue merely as a matter of "neglect" and not "excusable" neglect. It gave no weight to the fact that petitioners mailed their opt-out notices four days before the deadline. Nor did the court consider that the opt-out notice did not plainly require the notice to be received by April 11, 2005, but that it be mailed "in time to be received no later than April 11, 2005." *Id.* at 48a. Four days was enough lead time in the normal course for the opt-outs to be received by the deadline. In any event, under *Pioneer*, the lower courts may not simply stop at a finding of neglect; if neglect were never excusable, then the "excusable neglect" standard would be meaningless.

The court faulted petitioners for "using regular first class mail instead of an expedited service such as priority mail," reasoning that Priority Mail is "designed to deliver mail in 2-3 days" and "is clearly identified in the U.S. Postal Service website as a subset of first class mail." *Id.* at 6a & n.2. The court thus necessarily held that, had petitioners sent their opt-out notices via a form of first-class mail that is normally delivered within 2-3 days, that fact would have been entitled to some weight in the excusable neglect analysis. The same website referred to by the court makes plain, however, that "First-Class Mail®" is

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[25] The district court characterized the four-day period as "two business days" (Pet. App. 6a-7a) because the April 7 mailing date was a Thursday and the April 11 due date was a Monday, but even in terms of "business days" it is common knowledge that mail is delivered on Saturdays. *See also* USPS Website ("Postal Business Days are Monday through Saturday (excluding Postal Holidays)."), *at* https://hdusps.esecurecare.net/cgi-bin/hdusps.cfg/php/enduser/std_alp.php?p_sid=Ql5KJBii&xssl=1 (FAQ No. 140 (Postal Business Days)).

also delivered in approximately "2-3-Days."[26] Likewise, Federal Rule of Civil Procedure 6(e) requires the addition of three days to the response time for a pleading where service is effected by mail, which demonstrates that the drafters of the Federal Rules, as approved by this Court, assumed that mail typically arrives within three days.

In *Pioneer*, this Court found a "dramatic ambiguity" in the fact that a notice of the bar date for claims against a debtor's estate – while crystal clear in and of itself ("Bar date is August 3, 1989.") – was in an "inconspicuous" place. 507 U.S. at 384, 398. Despite finding movants' counsel to be "remiss in failing to apprehend the notice," the Court found it would be an abuse of discretion *not* to find excusable neglect on the record before it, which was devoid of any prejudice to the non-movant or judicial administration, or bad faith by the movant. *Id.*

Analogously, in this case the settlement agreement drafted by respondents and plaintiffs' class counsel, and approved by the court, was specifically designed to expose petitioners to the vagaries of mail delivery. Neither overnight delivery nor a postmark due date was permitted. Petitioners mailed their opt-out notices four days before the deadline, and the Postal Service's own website states that the normal delivery time is 2-3 days. Although the district court has some discretion in balancing the various *Pioneer* factors, it may not simply decide to give no weight to a factor based solely on a finding of neglect.[27]

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[26] USPS Website, *at* http://www.usps.com/business/mailingtools/mailingproducts.htm?from=home&page=mailingproductsservices.

[27] Reversal here would mandate a finding of excusable neglect and thus make a remand unnecessary: there is no prejudice; petitioners' reliance on the mails should get considerable weight; and, as the district court acknowledged, there is no evidence that petitioners acted in bad faith. *See Pioneer*, 507 U.S. at 398-99 (no remand where it would be an abuse of discretion not to find excusable neglect). At a minimum, however, the court below would have to "perform again the balancing process." *United States v. Third Nat'l Bank*, 390 U.S. 171, 183-84 (1968); *id.* ("To weigh adequately one of these factors against the other

B. Federal Courts Are Deeply Divided As To Whether Some Weight Or No Weight Should Be Given To Reliance On The "Normal" Or "Usual" Timeframe For Delivery Of Mail

1. The Second, Third, Fifth, and Tenth Circuits hold that reliance on the normal course of mail delivery is to be given significant weight in assessing excusable neglect. In *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1558, 1563 n.3 (1991), the Tenth Circuit affirmed the district court's grant of relief from a tardy notice of appeal sent three days in advance of the filing deadline, where mail delivery generally took two days between the cities in question. *See also Maryland Cas. Co. v. Conner*, 382 F.2d 13, 16 (10th Cir. 1967) ("If a lawyer mails a notice of appeal two days ahead of the due date, when one day is ordinarily enough for the mail to be delivered, it would seem clearly unfair to bar the appeal because a storm or other unforeseen cause of delay delayed the delivery. This example is not hypothetical; it has happened.").

The Fifth Circuit in *Gibbs v. Town of Frisco City*, 626 F.2d 1218 (1980), reversed the district court and found that a three-day mailing period was sufficient, especially when "the published service standards of the United States Post Office reflect that mail from Selma to Mobile is delivered overnight" and the tardy filer had allowed "twice the normal time for delivery." *Id.* at 1220; *see also Sanchez v. Board of Regents*, 625 F.2d 521, 522 (5th Cir. 1980) ("[R]eliance on the normal course of delivery of mail is reasonable and may be the basis for a court to excuse [an] otherwise untimely filing."); *cf. In re Cendant Corp. PRIDES Litig.*, 233 F.3d at 197 (listing "misrouted mail" among excusable neglect circumstances that can constitute excusable neglect).

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requires a proper conclusion as to each. Having decided that the court below erred in assessing [one factor], we should remand, so that the District Court can perform again the balancing process mandated by the Act.").

In *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), a tardy notice of appeal was sent four days (two business days) prior to the filing deadline. Explaining that "uncontrollable delays in mail delivery may be a basis for a finding of excusable neglect" under the equitable inquiry required by *Pioneer*, the court took judicial notice of a snowstorm as a possible explanation for the unusual five-day delivery time. *Id.* at 1180 & n.6 (internal quotation marks and emphasis omitted); *see also Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 525 (2d Cir. 1996) ("Normally it is assumed that a mailed document is received three days after its mailing.") (citing Fed. R. Civ. P. 6(e)).[28]

Finally, in *Ramseur v. Beyer*, 921 F.2d 504 (1990), the Third Circuit reversed a district court's refusal to grant relief where a notice of appeal was mailed six days early but arrived seven days late, despite traveling only five miles to the courthouse. Finding that counsel had "reasonably believed" that the notice had been timely mailed, the court held that excusable neglect had been shown. *Id.* at 506-07; *see also* 20 *Moore's Federal Practice* ¶ 304.14[2][a], at 304-54 (2006) ("If the notice of appeal is mailed in time so that in normal course it will arrive in time, but it does not, extensions have been upheld.").

2. In contrast, the Fourth, Sixth, Seventh, and Federal Circuits have all found that reliance on the normal course of mail delivery cannot form the basis for a finding of excusable neglect. Instead, as in the decision below, a litigant is held to assume the risk of delayed delivery. In

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[28] In *Zipperer v. School Board of Seminole County*, 111 F.3d 847 (1997), the Eleventh Circuit found excusable neglect where a tardy notice of appeal had been mailed six days before the required filing date. While the court could be read to have suggested that reliance on "the three days required for normal mail delivery" would be excusable, *id.* at 850, it held otherwise in this case. *See* Pet. App. 7a n.4 ("Although some case law has referred to a general standard of three days for mailing, *see Zipperer*, there is no set rule that insulates parties whose papers are not delivered within three days from suffering the consequences of their own actions.") (full citation omitted).

Thompson v. E.I. DuPont de Nemours & Co., 76 F.3d 530 (1996), the Fourth Circuit found that the district court "most assuredly did not abuse its discretion" in refusing to find excusable neglect. *Id.* at 534. In affirming the lower court's ruling, the court rejected any reliance on a three-day delivery period, holding that a "litigant who decides to rely on the vagaries of the mail must suffer the consequences if the notice of appeal fails to arrive within the applicable time period." *Id.*

The Federal Circuit likewise has embraced the view that unaccountable mail delays – or even the failure to deliver mail at all – should be given no weight by a district court in assessing excusable neglect. In that court's view, a litigant in electing "ordinary mail" has "assumed the risk that the motion would not be timely received." *Penrod Drilling Co. v. United States*, 925 F.2d 406, 408 (1991); *see also Howard v. United States*, No. 91-5111, 1991 WL 263712, at *1 (Fed. Cir. Dec. 16, 1991) (per curiam) (judgment noted at 951 F.2d 1267) (interpreting *Penrod* to mean that, "when a filing is made by ordinary mail, the risk of delay or non-delivery is on the filing party"). And the Sixth Circuit has bluntly held that "[m]ail delays . . . are not grounds for excusable neglect." *In re Crider*, No. 98-2376, 2000 WL 191823, at *3 n.3 (Feb. 10, 2000) (judgment noted at 205 F.3d 1339).

In *Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat*, 808 F.2d 1249 (1987), the Seventh Circuit found that a district court did not abuse its discretion in finding that a litigant who mailed his notice of appeal three days before the filing deadline could not rely during the holiday season on the "normal two to three days" required for mail delivery. *Id.* at 1253. And, in a conclusion that starkly conflicts with the Second Circuit's conclusion in *Sherlock*, 84 F.3d at 525, the Seventh Circuit has explicitly rejected a litigant's analogy to Federal Rule of Civil Procedure 6(e)'s allowance of an extra three days for documents served by mail, declaring the argument to be "specious." 808 F.2d at 1253.

C. The Eleventh Circuit's Approach Contravenes The Flexibility Required By *Pioneer*

The court's approach below exemplifies the inflexibility this Court rejected in *Pioneer*, which held that "excusable neglect" is an "elastic concept" demanding consideration of "all relevant circumstances surrounding the party's omission." 507 U.S. at 392, 395. Indeed, *Pioneer* specifically rejected the dissent's approach that would have required a party seeking relief to make a threshold showing of blamelessness *before* argument could be heard on the other prongs of the test. In rejecting that approach, *Pioneer* noted that it would "narrow[] the range of factors to be considered in making the 'excusable neglect' determination," *id.* at 395 n.14, and that incorporating such a "bright-line rule" would erect a "rigid barrier" against relief that was "irreconcilable with our cases assigning a more flexible meaning to 'excusable *neglect*,'" *id.*

But the ruling below – and those of four other circuits – have imposed a "rigid barrier" to relief by precluding reliance on the normal time for mail delivery. By concluding that any fault or lack of diligence by the movant in sending mail automatically makes a missed deadline, in effect, *per se* inexcusable, the lower court likewise failed to adhere to *Pioneer*'s teaching that even "omissions caused by carelessness" (*id.* at 388) can be excusable based on a proper balancing of all the equities.[29]

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[29] A recent en banc panel of the Ninth Circuit noted the general "disarray" and "confusion" in the courts of appeals about the degree of flexibility required by *Pioneer*. *Pincay v. Andrews*, 389 F.3d 853, 857 (2004) (en banc), *cert. denied*, 544 U.S. 961 (2005); *see id.* at 859 ("Any rationale suggesting that misinterpretation of an unambiguous rule can never be excusable neglect is, in our view, contrary to [*Pioneer*'s] instruction."); *id.* at 860 ("There should similarly be no rigid legal rule against late filings attributable to any particular type of negligence."); *see also In re Vitamins Antitrust Class Actions*, 327 F.3d 1207 (D.C. Cir. 2003) ("On appeal, UCB urges this court to adopt a *per se* rule that garden variety attorney inattention can never constitute excusable neglect. We decline and uphold the district court. The *Pioneer* standard precludes the adoption of any such *per se* rule.").

D. Restricting The Ability Of Class Members To Opt Out Of An Insufficient Settlement Negotiated By Others Implicates Due Process

Resolution of the circuit conflicts at issue here is also critically important to the fair and just administration of class-action litigation. This Court has voiced two core principles in its efforts to reconcile the "inherent tension" between class-action lawsuits and the "day-in-court ideal." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

First, constitutional due process – and not just the dictates of Rule 23 – demands that absent class members be given the opportunity to opt out of a class. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."). This right to opt out as an absent class member in turn reflects the deep-rooted preference for a trial on the merits in which the plaintiff is the master of his own complaint.

Second, certification of class settlements requires "'heightened attention'" in order to ensure that class counsel faithfully guards the interests of the class. *Ortiz*, 527 U.S. at 848-49 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)) (alteration omitted). This latter principle grows out of this Court's observation that, in negotiating class settlements, class counsel and defendants often pursue interests that are, at best, only proximate to the interests of absent class members. *See id.* at 852 n.30 ([W]ith an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant."); *Amchem*, 521 U.S. at 627 (class settlements are as often made "to confine compensation and to limit defendants' liability" as to remedy the harms incurred).[30]

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[30] Commentators have exhaustively documented the reasons why class counsel may not always adequately represent the class members.

Here, plaintiffs' class counsel negotiated a reduced settlement after losing two appeals and facing a possible third reversal on class-certification issues not at issue in petitioners' non-class Illinois state-court action. The settlement amount was negotiated by class counsel and respondents, and overseen by the district court, with the awareness and expectation that petitioners would opt out. Moreover, as respondents and the district court knew at the time, the blow provision was carefully tailored to preclude the possibility that any of the Illinois TPP opt-outs could trigger respondents' blow rights.

The Eleventh Circuit's approach invites class counsel and class-action defendants to inject ever more burdensome opt-out requirements into class settlements in the hopes that a few would-be opt-outs will fail to meet those requirements.[31] By ensuring both that all non-movants will be able to show substantial prejudice in the event that relief from a tardy filing is granted, and that reliance on the normal course of mail delivery can never be excused, the court's approach below places additional barriers to absent class members' due process rights and substitutes a rigid and predetermined formula for the "flexible" and "elastic" balancing test devised by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

See, e.g., Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 Notre Dame L. Rev. 1787, 1800-36 (2004); Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 Tex. L. Rev. 287, 335-41 (2003); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1367-84 (1995).

[31] *See, e.g.*, Richard A. Nagareda, *Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights*, 2003 U. Chi. Legal F. 141, 142 (2003) (documenting "opt-out minimization" techniques deployed by "class settlement designers" to deter opt-outs).

Respectfully submitted,

W. SCOTT SIMMER
HARDY VIEUX
ROBINS, KAPLAN, MILLER
& CIRESI L.L.P.
1801 K Street, N.W.
Suite 1200
Washington, D.C. 20006
(202) 775-0725

JAMES HARRINGTON
ROBINS, KAPLAN, MILLER
& CIRESI L.L.P.
800 Boylston, 25th Floor
Boston, Massachusetts 02199
(617) 267-2300

DAVID C. FREDERICK
Counsel of Record
SCOTT K. ATTAWAY
DAVID F. ENGSTROM
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

October 3, 2006

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-14054
Non-Argument Calendar

D.C. Docket No. 99-01317-MD-PAS

VALLEY DRUG COMPANY, ET AL.,
Plaintiffs,

TRUSTEES OF THE CORRECTION OFFICERS BENEVOLENT ASSOCIATION SECURITY BENEFITS FUND – RETIREES, ET AL.,
Plaintiffs-Appellants,

v.

GENEVA PHARMACEUTICALS, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(May 3, 2006)

Before TJOFLAT, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

In this class action, the district court, pursuant to a settlement agreement that had been negotiated and would be presented to the court for approval, established April 11, 2005, as the deadline for the claims administrator's receipt of opt-out requests. Appellants missed this deadline and moved the court for Fed. R. Civ. P. 6(b) relief – so that they could take their claims elsewhere. The court held a hearing on appellants' motions, considered the par-

ties [*sic*] submissions and arguments, and denied the motions. Appellants appeal the court's rulings.

We review the district court's decision for abuse of discretion. After considering the parties [*sic*] briefs and the relevant portions of the record, we find no such abuse.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 99-MDL-1317-SEITZ/KLEIN

IN RE: TERAZOSIN HYDROCHLORIDE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

United Wisconsin Services, Inc., et al. v. Abbott Laboratories, N.D. Ill. C.A. No. 99-C-7410(JBZ)

Grosskrueger, el al. v. Abbott Laboratories, et al., N.D. Ill., C.A. No. 99C-7883(JBZ)

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Mednick v. Abbott Laboratories, et al., No. 2:00-3468

O'Neal v. Abbott Laboratories, et al., No. 00-J-1504-S

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State of Florida, et al. v. Abbott Laboratories, et al., S.D. Fla. No. 01-4006-Civ-Gold

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ORDER REGARDING OPT-OUTS FROM THE INDIRECT PURCHASER PLAINTIFF CLASSES' SETTLEMENT

THIS MATTER is before the Court upon (1) the Motion of the Plaintiffs in the Illinois Opt Out Case to Extend the Indirect Purchaser Opt-Out Deadline to Accommodate Four Day U.S. Mail Delivery Delay [DE-1580]; (2) the Motion of Trustees of Correction Officers Benevolent Association Security Benefits Fund Retirees and The Correction Officers Benevolent Association Security Benefits Fund Active, Trustees of Local 445 Freight Division Welfare Fund, Trustees of the Local 445 Construction Division Welfare Fund, and New York City Transit Authority (collectively, "the New York TPPs") for Leave to File Late Opt-Out Notices [DE-1586]; (3) the Motion of the Illinois Plaintiffs to Establish a Conditional Schedule for Class Settlement Objections and Class Member Claims [DE-1600]; (4) the New York TPPs' Motion to Join the Motion of the Illinois Opt-Out Plaintiffs to Establish a Conditional Schedule [DE-1598]; and (5) the Motion of the Illinois Plaintiffs for Leave to File a Reply Brief to Address Issues Raised by Defendants in Late-Served Opposition Brief and at Oral Argument [DE-1601]. The deadline by which the Claims Administrator had to receive all third-party payer ("TPP") requests to opt-out of the indirect Purchaser Plaintiff Classes' ("IPP") settlement was April 11, 2005. In these motions, certain TPPs ask the Court to extend the opt-out deadline and/or accept their untimely opt-outs. Having considered all of the submissions and arguments with respect thereto, including the arguments of counsel at the final fairness hearing held on June 28 and June 29, 2005, and otherwise being fully informed in the premises, the Court denies both motions in accordance with its oral rulings at the end of the fairness hearing.

I. The Illinois TPPs

In the Illinois motion, a group of TPPs who are Plaintiffs in *BCBSM, et al. v. Abbott Labs., Inc., and Geneva Pharms., Inc.*, Case No. 03L-009743, before the Honorable

Paddy H. McNamara in Cook County, Illinois, seek a four-day extension of the April 11, 2005, opt-out cutoff. All fifteen of the Illinois TPPs[1] mailed their Requests for Exclusion from the IPP settlement, together with their drug payment data, sometime on Thursday, April 7, 2005. Eight of the notices arrived on or before April 11, 2005, but, as verified by the Claims Administrator, seven of the notices did not arrive until April 13 or April 15, 2005. The Illinois TPPs state that they acted in good faith and with all reasonable diligence, and argue that they should not be penalized for a Postal Service delay that was not within their reasonable control.

The Illinois TPPs rely on Fed. R. Civ. P. 6(b)(2), and argue that they have demonstrated "excusable neglect" for an extension of the opt-out deadline. Rule 6(b)(2) provides that:

> When by these rules or by a notice given thereunder by order of the court an act is required or allowed to be done within a specified time, the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done when the failure to act was the result of excusable neglect.

As the Supreme Court has explained, the determination of whether to accept a late filing based on excusable neglect is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993). The factors to be considered are "the danger of prejudice to the [opposing party], the length of

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[1] The Illinois Plaintiffs are Anthem. Blue Cross Blue Shield of Minnesota, Blue Cross Blue Shield of Massachusetts, Blue Cross Blue Shield of Nebraska, Wellchoice (Empire), Horizon Healthcare Services, Mutual of Omaha Insurance Company, Blue Cross Blue Shield of Tennessee, CareFirst, Excellus Health Plan, Guardian Life Insurance Company, Health Care Service Corp., Federal Mutual Insurance Company, Wellmark, Blue Cross Blue Shield of Florida, and their subsidiaries.

the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* Further, "the starting point and common denominator (indeed, the *sine qua non*) in every case employing an analysis of excusable neglect is an explanation of the reason for the delay." *Demint v. NationsBank Corp.*, 208 F.R.D. 639, 642 & n.4 (M.D. Fla. 2002); *see also* Manual for Complex Litigation (Third) § 30.231 (1995) (stating that "[the Court may, in its discretion, treat as effective a tardy election to opt out. In exercising its discretion, the court should consider the reasons for the delay, whether there was excusable neglect, and whether prejudice resulted.").

Upon review of the facts set forth in the affidavit of Lyzette Wallace, of the law firm of Robins, Kaplan, Miller & Ciresi L.L.P., the parties' submissions, and the arguments of counsel at the fairness hearing, the Court finds that there is insufficient evidence to support a finding of excusable neglect. The Illinois TPPs have long been aware of the settlement in this case, and were given ample notice of the April 11, 2005, opt-out deadline. In fact, the Illinois TPPs are represented by the same attorneys who represented Kaiser Foundation Health Plans, Inc., in this multi-district litigation before Kaiser was remanded to California in June 2005. Although the Illinois TPPs urge the Court to place the blame for the late arrival of seven of their opt-out requests on the U.S. Postal Service, the fact remains that they assumed the risk of missing the deadline by allotting only two business days for mailing and using regular first class mail instead of an expedited service such as priority mail.[2] *See In re New England Mut. Life*, 204 F.R.D. 6, 14 (D. Mass. 2001) ("It is

[2] The Illinois TPPs contend that they had no choice but to send their exclusion forms by ordinary first class mail, as that was the method of delivery prescribed in the TPP Notice. However, this argument misses the fact that Priority Mail, designed to deliver mail in 2-3 days, is clearly identified in the U.S. Postal Service website as a subset of first class mail. The Illinois TPPs have failed to provide any explanation as to why they failed to use this expedited method of delivery.

well-established that the party that selects the mode of transmission undertakes the risks associated with that method."). And further, Ms. Wallace's affidavit provides no indication to the Court as to what time on Thursday, April 7, 2005, the exclusion requests were mailed, nor did counsel clarify that issue for the Court at the fairness hearing. The failure to clarify this point leaves the Court to assume that, more likely than not, the opt-out forms were mailed after working hours on April 7, 2005. Thus, it was an exceedingly risky proposition for the Illinois TPPs to presume that the exclusion forms would make it from Washington, D.C., and be received in West Palm Beach, Florida in only two business days.[3]

The Court further finds that the factors enumerated in *Pioneer* do not support the Illinois TPPs' position. First, as explained above, while the Illinois TPPs may not have control over how quickly the mail is delivered, they did have control over how far in advance they mailed their exclusion forms, and what method of delivery they utilized. Despite being fully aware of the approaching deadline, the Illinois TPPs left only two business days for the exclusion forms to be mailed and received, and did not utilize the most expeditious means of delivery that was at their disposal.[4] Second, while the length of the delay was

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[3] The Illinois TPPs also fail to explain why they did not, given the late mailing date, follow up with the Claims Administrator to confirm timely receipt on April 11, 2005, instead waiting until June 16, 2005 to contact Complete Claim Solutions, Inc. This failure further supports a finding that the Illinois TPPs did not act with all reasonable diligence to meet the April 11, 2005, deadline.

[4] The Court also rejects the Illinois TPPs suggestion that there is some legally cognizable rule assuming that mail will reach its destination within three mailing days. Although some case law has referred to a general standard of three days for mailing, *see Zipperer v. School Ed. of Seminole Cty.*, 111 F.3d 847, 850 (11th Cir. 1997), there is no set rule that insulates parties whose papers are not delivered within three days from suffering the consequences of their own actions. *See Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de stat*, 808 F.2d 1249, 1253 (7th Cir. 1987) (holding that "claims that Fed. R. Civ. P. 6(e), allowing an extra three days when documents are served by mail,

not substantial, allowing late opt-outs would prejudice the Defendants in that they would be required to litigate against entities who inexcusably failed to submit timely opt-outs forms. Defendants entered into the IPP settlement in order to achieve a full and complete resolution of all IPP claims, and the parties are entitled to hold potential class members to the deadlines that were the product of vigorous negotiations.[5] Third, contrary to their conclusory assertion in the motion, the Illinois TPPs have offered no evidence to support a finding that they acted in "good faith." As the Defendants point out in their response, absent any affidavits or other evidence establishing some good faith reason for their delay,[6] the Court could reasonably conclude that the Illinois TPPs waited until the last minute intentionally with the hopes of minimizing the chance that the Defendants might seek to terminate the IPP settlement on April 11, 2005, based on their exclusions.

For these reasons, and upon review of the applicable caselaw cited in the parties' briefs and addressed at the

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was intended to establish presumptively that mail reaches its intended destination in three days [are] clearly specious.").

[5] As part of their argument, the Illinois TPPs contend that Defendants cannot claim to be prejudiced by the late opt-out because they made "their intention to opt out of the indirect purchasers' class action clear" years ago. However, Defendants refute that suggestion, and point out that the Illinois TPPs do not identify when that intention was made clear, and provide no citation or support for their statement. In the absence of any evidence to the contrary, the Court takes as true the Defendants' statement that the Illinois TPPs consistently refused to tell the Defendants whether they intended to opt-out of the MDL action.

[6] At the hearing, counsel for the Illinois TPPs suggested that the reason that the exclusion forms were not sent out until April 7, 2005, was because of the time and effort that it took to gather all of the documentation that was required to be submitted in accordance with the instructions on the exclusion form. However, there is no record evidence on that issue, and indeed, neither the motion nor the affidavit of Ms. Wallace even mentions the document production as a factor. Further, it appears that much of the documentation that was being gathered was not even necessary for the Illinois TPPs to opt-out.

fairness hearing, the Court finds that there is no support for a finding of excusable neglect, such that an extension of the opt-out deadline is warranted.[7] *See Grilli v. Metro. Life Ins. Co., Inc.*, 78 F.3d 1533, 1538 (11th Cir. 1996) (finding no abuse of discretion in the district court's refusal to allow late opt-outs in the absence of a clear showing of excusable neglect); *see also Demint*, 208 F.R.D. at 643; *In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 204 F.R.D. 6, 14 (D. Mass. 2001). Accordingly, the Illinois TPPs' Motion to Extend the Indirect Purchaser Opt-Out Deadline to Accommodate Four Day U.S. Mail Delivery Delay is denied.

II. The New York TPPs

Similarly, the New York TPPs ask the Court for leave to file late opt-out notices. The New York TPPs are five plaintiffs represented by the same counsel in a related action captioned *Asher v. Abbott Labs., et al.*, pending in the Supreme Court of the State of New York under the Index No. 123431/99. The *Asher* action was stayed in favor of this multidistrict litigation in July 2003. The New York TPPs state that counsel for the parties in this action should have, but did not, advise their counsel or the New York court of the proposed settlement. Hypothesizing that the choice not to advise them was a "deliberate decision" designed to deprive them of their right to opt-out, the New York TPPs argue that an extension of the opt-out deadline is necessary to avoid the inequitable result of preventing them from pursuing their individual claims.

At the fairness hearing, the Court inquired of Thomas Glenn of Complete Claim Solutions, Inc. ("CCS"), as to whether the New York TPPs were notified of the settlement as part of the TPP Notice Plan. Under oath, Mr.

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[7] This finding is in accordance with other similar actions involving late opt-outs. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 237 (D.N.J. 1997) (recognized that granting leave for an extension of the opt-out deadline is an infrequent occurrence and is only warranted where significant mitigating circumstances exist).

Glenn testified that notices were mailed directly to the New York TPPs, in addition to the notice by publication. Mr. Glenn and counsel for the New York TPPs also confirmed that the addresses that CCS had on file for the New York TPPs were correct and accurate.[8] Having established that notices were mailed to the proper addresses, and in light of the Court's previous finding that the Notice Plan was fair and reasonable and the best notice practicable under the circumstances, there is no basis for extending the opt-out deadline for the New York TPPs.

The only arguments that the New York TPPs advance, in their papers and at the hearing, are that they should be allowed to file late opt-outs because: (1) their case was stayed in favor of this litigation, and it was clear to all of the parties that the New York TPPs had elected to pursue their claims individually; (2) they have shown excusable neglect for the late filing because they did not learn of the settlement until June 2005, when counsel noticed a posting regarding the settlement on a website; and (3) the parties to this multi-district litigation acted in bad faith by "deliberately fail[ing] to disclose the settlement to the New York TPPs or their counsel in the hope that the New York TPPs would not learn of the settlement during the brief opt-out period. None of these arguments merit an extension of the opt-out deadline. As to the first issue, from the Defendants' perspective, it was equally possible that the New York TPPs found the settlement to be a fair and equitable resolution, and chose not to opt-out from the settlement rather than depriving themselves of a share of the settlement proceeds. Second, with respect to the notice issue, the evidence amply demonstrates that the Claims Administrator mailed notices to the New York TPPs at the correct addresses, and that notices were also published in the *Wall Street Journal*, the *New York*

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[8] One of the five New York TPPs, the Transit Workers Fund. has actually filed a partial claim as part of the IPP settlement. That TPP, therefore, cannot now be heard to argue that it was not aware of the settlement or that it should be excused from applicable deadlines.

Times, and other major publications. Because the notice plan was fair and reasonable, and the Court found it to be the best notice practicable under the circumstances, the unfortunate fact that a particular TPP may not have received actual notice has no bearing and does not warrant an extension of the opt-out date. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 238 (D.N.J. 1997) (denying request for extension of opt-out deadline where movants alleged that they did not receive notice or received notice late, but where the notice plan was found to comply with basic requirements of due process).

Finally, the New York TPPs' accusations of bad faith are unsupported by any record evidence. In fact, the Court inquired of counsel for the IPP classes, Geoffrey Horn, regarding his communications with counsel for the New York TPPs, and the Court is satisfied that there was no bad faith involved. While in the future, counsel should consider extending the professional courtesy of contacting counsel for the plaintiffs in stayed cases such as the *Asher* case, in order to avoid situations such as these, there has been no demonstration of bad faith or any derogation of a professional duty on class counsel's part.[9] Accordingly, the New York TPPs have failed to meet their burden of

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[9] Further, counsel for the New York TPPs provides no explanation as to why he failed to follow up regarding the status of this multi-district litigation, instead waiting for the IPP Classes' counsel to take the initiative and call him. In light of the stage of this litigation, and the fact that the *Asher* case was stayed for almost two years, counsel for the New York TPPs should have been following this case and, at the very least, could have done a public records search every few months to determine when trial was scheduled to commence, whether any settlement had been reached, and whether there was a possibility that the stay would soon be lifted. Instead, counsel for the New York TPPs merely states that he had communications with Geoffrey Horn, Esq., counsel for the IPP Classes, in July of 2003 and "after April 2004," without any specification of when the last communication took place. In this regard, it does not appear that the New York TPPs and their counsel acted diligently.

demonstrating excusable neglect, and their motion for leave to file late opt-out notices must be denied.

III. List of Timely, Effective Opt-Outs

In light of the Court's denial of the motions of the Illinois and New York TPPs, those particular entities may not opt-out and are bound by the IPP settlement. For purposes of clarity, the following are the TPPs and consumers whose opt-outs were timely received and who are deemed to have effectively excluded themselves from the IPP settlement:

Effective TPP Opt-Outs

Nissan North America Inc.
c/o Virginia King
Sr. Manager
Employee Recs.
P.O. Box 191
Gardena, CA 90248-0191

Boca Resorts Inc.,
Employee Benefit Plan
c/o Sonia Marrero
Director of Benefits
501 E Camino Real
Boca Raton, FL 33432

Boca Resorts Resorts Club
Employee Benefit Plan
c/o Sonia Marrero
Director of Benefits
501 E Camino Real
Boca Raton, FL 33432

Paul T. Liistro
385 W Center Street
Manchester, CT 06040

Kaiser Found. Health Plan
of Georgia
c/o Mitchell Cohen Sr. Counsel
3495 Piedmont Road NE
Bldg. 9
Atlanta, GA 30305-1736

Kaiser Found. Health Plan
of the Mid-Atlantic
c/o Mitchell Cohen Sr. Counsel
2101 E Jefferson
Rockville, MD 20852

Kaiser Found. Health Plan
of the Northwest
c/o Mitchell Cohen Sr. Counsel
500 NE Multnomah,
Suite 100
Portland, OR

Kaiser Found. Health Plan
of Ohio
c/o Mitchell Cohen Sr. Counsel
North Point Tower 1001
Lakeside Avenue, Suite 1200
Cleveland, OH

DLA Piper Rudnick Gray
Cary US LLP
c/o Tracey M. McClaughlin
HR Benefits
6225 Smith Avenue
Suite 2B
Baltimore, MD

Kaiser Foundation Health
Plan
c/o Mitchell Cohen Sr. Counsel
One Kaiser Plaza
Oakland, CA 94612

Kaiser Foundation Hospitals
c/o Mitchell Cohen Sr. Counsel
One Kaiser Plaza
Oakland, CA 94612

Kaiser Foundation Health
Plan of Colorado
c/o Mitchell Cohen Sr. Counsel
10350 E Dakota Avenue
Denver, CO 80231-1314

Empire BCBS
c/o Mitchell D. Richling VP
11 W 42nd Street
New York, NY 10036

BCBS of Nebraska
c/o Thomas J Jenkins VP
and Gen. Counsel
7261 Mercy Road
Omaha, NE 68180-0001

BCBS of Massachusetts
c/o Steven Skwara
Ass. Gen. Counsel
Robins Kaplan Miller & Ciresi
1801 K Street NW
Washington, DC 20006

Wellmark Inc.
c/o F. Joseph Du Bray
Gen. Counsel
636 Grand Avenue
Des Moines, IA 50309-2565

Swiss Re Life & Health
America Inc.
c/o Peter J. Durand VP
Nat. Trial Counsel
175 King Street
Armonk, NY 10504-1606

Swiss Re America Holding
Corp.
c/o Peter J. Durand
175 King Street
Armonk, NY 10504-1606

Swiss Am Reasurance Co.
Swiss Re Life & Health Am
Inc.
175 King Street
Armonk, NY 10504-1606

Excellus Health Plan Inc.
c/o Ralph Cox Gen. Counsel
Robins Kaplan Miller & Ciresi
1801 K Street NW
Washington, DC 20006-1307

Guardian
c/o Robert D. Grauer
Sen. Atty.
7 Hanover Sq.
New York, NY 10004

Effective Consumer Opt-Outs

Mr. Edward P. McCarthy of East Setauket, NY

IV. Conclusion

For the reasons set forth above, and as articulated on the record at the June 28 and June 29, 2005, fairness hearing, it is hereby

ORDERED that:

(1) The Motion of the Plaintiffs in the Illinois Opt Out Case to Extend the Indirect Purchaser Opt-Out Deadline to Accommodate Four Day U.S. Mail Delivery Delay [DE-1580] is DENIED;

(2) The Motion of Trustees of Correction Officers Benevolent Association Security Benefits Fund-Retirees and The Correction Officers Benevolent Association Security Benefits Fund Active, Trustees of Local 445 Freight Division Welfare Fund, Trustees of the Local 445 Construction Division Welfare Fund, and New York City Transit Authority for Leave to File Late Opt-Out Notices [DE-1586] is DENIED;

(3) The Motion of the Plaintiffs in the Illinois Opt-Out Case to Establish a Conditional Schedule for Class Settlement Objections and Class Member Claims [DE-1600] is DENIED, as the Illinois TPPs have failed to provide any justification or supporting authorities for the extraordinary request that the period of time for objections be reopened, following a two-day fairness hearing and following the Court's oral ruling finally approving the IPP settlement;

(4) The New York TPPs' Motion to Join the Motion of the Illinois Opt-Out Plaintiffs to Establish a Conditional Schedule for Class Settlement Objections and Class Member Claims [DE-1598] is DENIED, for the same reasons articulated in paragraph 3 above;

(5) The Motion of the Plaintiffs in the Illinois Opt-Out Case for Leave to File a Reply Brief to Address Issues Raised by Defendants in Late-Served Opposition Brief

and at Oral Argument [DE-1601] is DENIED, in light of the fact that the Court orally announced its ruling denying the Illinois TPPs' motion for leave to file a late opt-in at the fairness hearing, and the Illinois TPPs fail to provide any authorities or arguments justifying the reversal of the Court's ruling.

DONE and ORDERED in Miami, Florida, this 8th day of July, 2005.

/s/ PATRICIA A. SEITZ
PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc:
U.S. Magistrate Judge Theodore Klein
All Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-14054-DD

VALLEY DRUG COMPANY, ET AL.,
Plaintiffs,

TRUSTEES OF THE CORRECTION OFFICERS BENEVOLENT ASSOCIATION SECURITY BENEFITS FUND – RETIREES, ET AL.,
Plaintiffs-Appellants,

v.

GENEVA PHARMACEUTICALS, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

[June 7, 2006]

BEFORE: TJOFLAT, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellants is DENIED.

ENTERED FOR THE COURT:

/s/ GERALD BARD TJOFLAT
UNITED STATES CIRCUIT JUDGE

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

ATTORNEYS AT LAW

800 Boylston Street
25th Floor
Boston, MA 02199
TEL: 617-267-2300
FAX: 617-267-8288
www.rkmc.com

JAMES S. HARRINGTON
617-859-2730

February 9, 2006

VIA FEDERAL EXPRESS

U.S. District Court, Southern District of Florida
Clerk's Office, Appeals Section
301 North Miami Avenue
Miami, FL 33128

Re: Re: In re Terazosin Hydrochloride
No. 99-MDL-1317

Dear Sir or Madam:

We represent the Illinois Plaintiffs in this matter. Supplementing our August 18, 2005 letter in which we designated those docket entries in 99-MDL-1317 that are pertinent to our client the Illinois Plaintiffs' appeal pending before the Eleventh Circuit, the Illinois Plaintiffs hereby designate the additional docket entry to be forwarded to the Eleventh Circuit: **1594**. We enclose the relevant page of the docket that reflects this supplement.

Since briefing is complete in the Eleventh Circuit, we request that D.E. 1594 be sent immediately to the Clerk of the Eleventh Circuit Court of Appeals. The Eleventh Circuit case number 05-14054-DD.

We appreciate your cooperation in this time-sensitive matter. This docket entry was not previously designated because it was filed under seal; Judge Seitz just recently unsealed the document and so our request is being made at this time. (See Order at D.E.1666).

BEST AVAILABLE COPY

Please feel free to contact the undersigned should you have any questions or concerns. We apologize for any inconvenience. Your continuing assistance in this matter is greatly appreciated.

Sincerely,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

/s/ JAMES S. HARRINGTON
James S. Harrington

Enclosures

cc: All Counsel of Record

RIDER A
TO THE SETTLEMENT AGREEMENT

This **Rider A** is filed under seal, and is supplemental to the Settlement Agreement (the "**Settlement Agreement**") dated March 1, 2005, among the Plaintiff States, Indirect Purchaser Plaintiffs and Defendants Abbott Laboratories, and Geneva Pharmaceuticals, Inc. (now known as Sandoz Inc.), to be used in determining the Events of Termination defined and described therein.

I. **Definitions**. The following terms have the meanings ascribed to them herein. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Settlement Agreement.

A. "**Illinois TPPs**" means the TPP members of the IPP Settlement Classes on whose behalf the Second Amended Complaint was filed in the action *BCBSM, Inc. et al. v. Abbott Laboratories et al.* now pending in Circuit Court of Cook County, Illinois, Case No. 03 L 009743. The style of the Illinois TPPs' Second Amended Complaint, reflecting the plaintiffs therein, is attached as Exhibit 1 to this Rider A.

B. "**Total TPP Terazosin Payments**" means $250,000,000, which the Parties agree only for purposes of the Settlement Agreement and this Rider A to be the total of all payments by TPPs for Terazosin Products purchased in, or sent via mail order to, the eighteen (18) IPP Class states during the period January 1, 1998 to December 31, 1999. The agreement to use this figure for the purpose just specified is not an agreement or acknowledgment (and shall not be relied upon as evidence or support for the contention) that this information is appropriately used for any other purpose, whether in connection with MDL No. 1317 or otherwise.

C. "**TPP Opt-Out Payment**" means the amount of the payments made by a TPP that executes and files a timely and valid Notice of Exclusion on or before the Third Party Payer Opt-Out Deadline for Terazosin Prod-

ucts purchased in, or sent via mail order to, the eighteen (18) IPP Class states from January 1, 1998, to December 31, 1999.

D. "**TPP Threshold Amount**" means $12,500,000, which is five percent (5%) of the Total TPP Terazosin Payments as defined above.

II. Determination of TPP Opt-Out Payments.

A. The TPP Notice of Exclusion requests that any opting-out TPP provide its total payments for Terazosin Products purchased in, or sent via mail order to, the eighteen (18) IPP Class states from January 1, 1998 to December 31, 1999. The TPP Notice of Exclusion further requests that the accuracy of this information be certified by the TPP under penalty of perjury. The TPP Notice of Exclusion also states that a timely and valid opt-out must be sent in time to be received by the Settlement Administrator no later than the close of business on April 11, 2005.

B. For any TPP that opts out and provides all of the requested payment information on a timely and duly-certified TPP Notice of Exclusion, the TPP Opt-Out Payment for that TPP shall be the amounts specified on its Notice of Exclusion.

III. Defendants' Rights to Terminate the Settlement Agreement

A. If (1) all TPPs that opt out provide all of the requested payment information on their timely and duly certified TPP Notices of Exclusion, and (2) the total of all TPP Opt-Out Payments determined as set forth in Section II.B above, excluding any TPP Opt-Out Payments attributable to any Illinois TPPs that opt out, equal or exceed the TPP Threshold Amount (or if less than all TPPs that opt-out provide all of the requested payment information but the total of all information that is received exceeds the TPP Threshold Amount), then Defendants shall have the right to exercise the termination rights provided in Section IV.A and X.A.1 of the Settlement Agreement. This

termination right may be exercised at Defendants' sole discretion at any time prior to 5:00 pm Pacific time on May 9, 2005, *except* as set forth below in paragraph III.B.

B. If (1) all TPPs that opt out provide all of the requested payment information on their timely and duly certified TPP Notices of Exclusion, and (2) the total of all TPP Opt-Out Payments determined as set forth in Section II.B above, excluding any TPP Opt-Out Payments attributable to any Illinois TPPs that opt out, is less than 40% of the TPP Threshold Amount, then Defendants' termination right shall be exercised, if at all, no later than 5:00 p.m. Pacific time on April 14, 2005.

C. In the event that one or more TPPs provide timely Notices of Exclusion that do not contain all of the payment information requested on the Notice of Exclusion form, then if Defendants have not exercised any right to terminate pursuant to Paragraph III.A above (by virtue of the fact that forms received with complete payment data exceed the TPP Threshold Amount), then the parties will cooperate between the TPP Opt-Out Deadline and 5:00 p.m. Pacific time on May 9, 2005, in a good faith effort to obtain information sufficient to determine the amounts of such TPPs' TPP Opt-Out Payments. Such efforts may include, without limitation, (1) seeking expedited discovery from the TPP; (2) using an approximation based on other drug cases, including the Cardizem CD litigation if possible; (3) using public data, such as IMS or covered lives; and (4) using the services of Professor Eric Green, the mediator in this case. In this event, however, Defendants shall nonetheless have the right to terminate if by May 9, 2005 they determine in good faith based upon their best estimates of total TPP Opt-Out Payments that the TPP Threshold Amount has been exceeded.

D. As a separate and independent termination right, if 300 or more Consumers, either individually or by one or more representatives, submit valid and timely requests to be excluded from the IPP Settlement Classes on or before the Consumer Opt-Out Deadline, then Defendants shall

have the right to exercise the termination rights provided in Section IV.A and X.A.1 of the Settlement Agreement. This separate and independent termination right may be exercised in good faith by Defendants at any time prior to 5:00 pm Pacific time on June 20, 2005.

IV. Agreement to File Rider A Under Seal. The Defendants and Plaintiffs shall present this Rider A to the Court in confidence, to be filed under Seal, and shall take all reasonable steps necessary to maintain the confidentiality of this Rider.

[attorney signature and address blocks omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 99-MDL-1317-SEITZ/KLEIN

IN RE: TERAZOSIN HYDROCHLORIDE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

United Wisconsin Services, Inc., et al. v. Abbott Laboratories, N.D. Ill. C.A. No. 99-C-7410(JBZ)

Grosskrueger, el al. v. Abbott Laboratories, et al., N.D. Ill. C.A. No. 99C-7883(JBZ)

Reid, et al. v. Abbott Laboratories, et al., D.D.C. C.A. No. 00-323

Scafani v. Abbott Laboratories, et al., N.D. Cal. C.A. No. 00-00508-SBA

Mednick v. Abbott Laboratories, et al., No. 2:00-3468

O'Neal v. Abbott Laboratories, et al., No. 00-J-1504-S

Grund v. Abbott Laboratories, et al., No. _____.

Blue Cross and Blue Shield of Alabama, Inc. v. Abbott Laboratories, et al., No. 00-1303-Civ.-Lenard

Bernstein v. Abbott Laboratories, E.D. Mich. C.A. No. 2:00-CV-72974

Blue Cross and Blue Shield of Michigan v. Abbott Laboratories, et al., No. 5:01-CV-95

State of Florida, et al. v. Abbott Laboratories, et al., S.D. Fla. No. 01-4006-Civ-Gold

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INDIRECT PURCHASER PLAINTIFF CLASSES' AND PLAINTIFF STATES' MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT, CERTIFICATION OF THE PROPOSED TENNESSEE INDIRECT PURCHASER SETTLEMENT CLASS FOR PURPOSES OF SETTLEMENT AND REVISING END DATE IN DEFINITION OF PREVIOUSLY CERTIFIED CLASSES AND APPROVAL OF THE FORM AND MANNER OF NOTICE TO THE TPP AND CONSUMER MEMBERS OF THE IPP CLASSES

The Indirect Purchaser Plaintiff Classes (the "IPP Classes")[1] and the States of Florida, Kansas, and Colorado (the "Plaintiff States"), as defined in the Settlement Agreement (collectively, the "Plaintiffs"), respectfully move the Court for an order, attached as Exhibit 2 hereto, (1) preliminarily approving a settlement between the Plaintiffs and Defendants Abbott Laboratories ("Abbott") and Geneva Pharmaceuticals, Inc. (now known as Sandoz, Inc.) ("Geneva"), dated March 3, 2005, and attached hereto as Exhibit 1; (2) certifying the proposed Tennessee Indirect Purchaser Class for purposes of settlement and extending the end date of the previously certified classes to March 7, 2005, (3) approving and ordering the implementation of the Notice Plan, Attachment C to the Settlement Agreement, which includes the Consumer Notice of Settlement (including Consumer Claim Form) (Exhibit 3 hereto), the Consumer Summary Notice of Settlement (Exhibit 4 hereto), the TPP Notice of Settlement (including TPP Notice of Exclusion and Claim Form) (Exhibit 5 hereto), and the TPP Summary Notice of Settlement (Exhibit 6 hereto); and (3) approving and ordering the implementation of the Consumer Distribution Plan (Exhibit 7 hereto), the TPP Distribution Plan (Exhibit 8 hereto), and the Government Compensation Plan (Exhibit 9

[1] All capitalized terms have the meanings agreed to in the Settlement Agreement unless otherwise specified herein.

hereto), in accordance with the Settlement Agreement. In support of the Motion, Plaintiffs respectfully show the Court as follows:

1. The Plaintiffs and the Defendants have entered into a Settlement Agreement (the "Proposed Settlement," attached hereto as Exhibit 1), subject to Rule 23(e) of the Federal Rules of Civil Procedure and Court approval, whereby, in exchange for a total cash payment of $30,700,000, $18,420,000 from Abbott and $12,280,000 from Geneva, the Plaintiffs release all Claims that were or could have been asserted against the Defendants in the Complaints in MDL 1317, and the Defendants have agreed to dismiss their Rule 23(f) appeal now pending in the Eleventh Circuit Court of Appeals of the IPP Classes' Certification Order. For settlement purposes only, the parties have agreed, subject to approval by the Court, that the class period certified by the Court on April 8, 2004, be extended to run from October 15, 1995, to the date of preliminary approval of the Proposed Settlement, which is currently anticipated to be March 7, 2005.

2. The proposed Tennessee Indirect Purchaser Class should be certified in light of settlement and the end date for the previously certified classes should be extended to March 7, 2005. In support of this motion, Plaintiffs submit the Declaration of Geoffrey M. Horn (Exhibit 7 hereto) and a memorandum of law being filed contemporaneously herewith.

3. The Proposed Settlement was achieved as a result of vigorous arm's-length negotiations between counsel for the Plaintiffs and counsel for the Defendants, with the assistance of a highly experienced mediator.

4. The Proposed Settlement will confer substantial benefits on the IPP Classes and the Plaintiff States, including: (1) a substantial financial recovery, and (2) the elimination of litigation risks against the Defendants. The Proposed Settlement is well within the range of possible approval by the Court.

5. Preliminary approval is the first step of a two-step process for approval of proposed class action settlements under Rule 23 of the Federal Rules of Civil Procedure. In the first step, the Court determines whether the Proposed Settlement falls within the range of possible approval. *See Manual for Complex Litigation, Third* (1995), §30.41. In the second step, after notice of the Proposed Settlement to the Class and an opportunity for Class members to object or otherwise be heard, the Court will determine whether to grant final approval of the Proposed Settlement as fair and reasonable under Rule 23.

6. The Proposed Settlement satisfies all of the factors required for preliminary approval under Rule 23, in that it falls within the range of possible approval, and thus the Settlement's terms should be provided to the IPP Classes as requested by this Motion.

7. Plaintiffs request that this Court appoint Complete Claims Solution, Inc. ("CCS") as the Settlement Administrator. CCS has administered numerous similar class settlements, including the previous settlement in this action with Defendant Ivax Pharmaceuticals, Inc. CCS's duties shall be those specified in the Settlement Agreement and related documents.

8. Plaintiffs request that the Court enter an order approving the Consumer Distribution Plan, TPP Distribution Plan, and Government Compensation Plan, attached hereto as Exhibits 7, 8, and 9, respectively, which set forth the allocation payment of the Settlement Funds in this case.

9. Plaintiffs request that the Court enter an Order directing that the Notice Plan (Attachment C to the Settlement Agreement) be implemented for TPP members of the IPP Classes by direct mailing of the TPP Notice of Settlement (including the Notice of Exclusion and Claim Form, Exhibit 5 hereto) to TPPs in the Settlement Administrator's database. The Notice Plan will notify all reasonably ascertainable TPP members of the IPP Classes of

their rights with respect to the Proposed Settlement and comply with the requirements of due process.

10. Plaintiffs request that the Court enter an Order directing that the Notice Plan be further implemented for TPP members of the IPP Classes by publication of the TPP Summary Notice of Settlement (Exhibit 6 hereto), as set forth in the Notice Plan, by the Settlement Administrator.

11. Plaintiffs request that the Court enter an Order directing that the Notice Plan be implemented for Consumer members of the IPP Classes by direct mailing of the Consumer Notice of Settlement (including the Consumer Claim Form) (Exhibit 3 hereto) to all Consumers identifiable in the Settlement Administrator's database from the Ivax Settlement Agreement. The Notice Plan will notify all reasonably ascertainable potential Consumer members of the IPP Classes, and all potential Consumer members of the IPP Classes who request a copy of the Consumer Notice, of their rights with respect to the Proposed Settlement and comply with the requirements of due process.

12. Plaintiffs request that the Court enter an Order directing that the Notice Plan be implemented by publication of the Consumer Summary Notice of Settlement (Exhibit 4 hereto), as set forth in the Notice Plan, by the Settlement Administrator.

13. Plaintiffs seek the Court's approval for the following proposed schedule for proceedings on the Proposed Settlement:

(a) Notice of Settlement mailed to TPP members of the IPP Classes starting March 10, 2005 and completed by March 11, 2005;

(b) Summary Notice of Settlement to TPP members of the IPP Classes to be published on March 11, 2005;

(c) TPP members of the IPP Classes submit any Notices of Exclusion for receipt on or before April 11, 2005;

(d) TPP members of the IPP Classes to submit any objections or notices of intent to appear at the Final Fairness Hearing on or before April 11, 2005;

(e) Notice Plan for Consumer members of the IPP Classes to be implemented beginning March 11, 2005, and completed by May 15, 2005;

(f) Consumer members of the IPP Classes to submit any Notices of Exclusion and objections on or before June 15, 2005;

(g) Plaintiffs' Memorandum in Support of Final Approval of the Settlement, the State Plaintiffs' Motion for Attorneys Fees and Costs, and any IPPs' application for attorneys' fees, expenses, and incentive awards to be filed on or before June 20, 2005;

(h) Hearing before the Court in final approval of the Settlement on June 27, 2005, subject to the Court's convenience; and

(i) Claim Forms Submitted by TPPs and Consumers to the Settlement Administrator to be postmarked no later than July 15, 2005.

14. IPPs and Defendants have agreed that Defendants may terminate this settlement under certain circumstances related to requests for exclusion by members of the IPP classes. The terms are set forth in Rider A to the Settlement Agreement, which the Parties request be filed under seal. Knowledge of the terms of Rider A is not necessary for any member of the IPP classes to consider options available to it.

15. Submitted contemporaneously herewith is the Plaintiffs' memorandum of law supporting this Motion.

16. A proposed Order is attached as Exhibit 2 hereto.

WHEREFORE, Plaintiffs respectfully move the Court to enter an Order:

A Granting preliminary approval of the Settlement with the Defendants in the form of the Proposed Order attached hereto as Exhibit 2;

B Certifying a Tennessee indirect Purchaser Class for purposes of settlement and extending the end date of the previously certified classes through and including March 7, 2005;

C Approving the Notice Plan for TPP members of the IPP Classes (Attachment C to the Settlement Agreement), and ordering the mailing of the TPP Notice of Settlement (including the Notice of Exclusion and Claim Forms) (Exhibit 5 hereto) and the publication of the TPP Summary Notice of Settlement (Exhibit 6 hereto) as provided therein;

D Approving the Notice Plan for Consumer members of the IPP Classes (Attachment C to the Settlement Agreement) and ordering the mailing of the Consumer Notice of Settlement (including the Consumer Claim Form) (Exhibit 3 hereto) and the publication of the Consumer Summary Notice of Settlement (Exhibit 4 hereto) as provided therein;

E Approving the Consumer Distribution, TPP Distribution, and that portion of the Government Compensation Plan, allocating amounts specified for the Designated Governmental Entities and civil penalties to Colorado; attached hereto as Exhibits 7, 8, and 9;

F Approving the appointment of CCS as the Settlement Administrator;

G Approving the schedule as set forth above;

H Approving the filing of Rider A to the Settlement Agreement under seal until thirty (30) days after the Effective Date; and

H. Pending the effective date of the Settlement Agreement, enjoining all members of the IPP Classes from instituting, commencing or prosecuting any action

against the Defendants based upon or relating to the claims released as set forth in the Settlement Agreement.

Respectfully submitted this 3rd day of March, 2005.

[attorney signature and address blocks omitted]

EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE TERAZOSIN HYDROCHLORIDE ANTITRUST LITIGATION

Master File No. 99-MDL-1317
MDL No. 1317

NOTICE OF PENDENCY OF CLASS ACTION, PROPOSED SETTLEMENT AND FAIRNESS HEARING

TO: ALL THIRD PARTY PAYERS THAT HAVE AT ANY TIME FROM OCTOBER 15, 1995 THROUGH MARCH 7, 2005 (THE "CLASS PERIOD") PAID ALL OR PART OF THE PURCHASE PRICE OF HYTRIN® OR ITS AB-RATED GENERIC BIOEQUIVALENTS ("TERAZOSIN PRODUCTS") INCLUDING ALL FORMS OF TERAZOSIN HYDROCHLORIDE OTHER THAN FOR RESALE, IN **ALABAMA, CALIFORNIA, FLORIDA, ILLINOIS, KANSAS, MAINE, MICHIGAN, MINNESOTA, MISSISSIPPI, NEVADA, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, SOUTH DAKOTA, TENNESSEE, WEST VIRGINIA OR WISCONSIN, OR VIA MAIL FOR RESIDENTS OF SUCH STATES.**

THIS NOTICE EXPLAINS YOUR RIGHTS – PLEASE READ IT CAREFULLY

I. PURPOSE OF THIS NOTICE

The parties to the above-captioned actions pending before the Honorable Patricia A. Seitz of the United States

District Court for the Southern District of Florida (the "Court") have agreed to a Settlement, described in more detail in Section IV. The Settlement is subject to approval by the Court. The purpose of this Notice is to inform Third Party Payer ("TPP") Members of the Indirect Purchaser Plaintiff ("IPP") Settlement Classes (described below) of their rights. The provisions in this Notice are qualified and subject in their entirety to the terms of the Settlement Agreement, copies of which are available for review in the manner provided in Section IX. Capitalized terms used but not defined herein have the meanings given to them in the Settlement Agreement.

II. THE SETTLEMENT CLASSES

The "IPP Settlement Classes" consist of all Consumers and TPPs who purchased and/or paid all or part of the purchase price of Terazosin Products in one or more of the following states – **Alabama, California, Florida, Illinois, Kansas, Maine, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, West Virginia, and Wisconsin** – or via mail order for delivery in one or more of those states, at any time during the period October 15, 1995 through March 7, 2005 (the "Class Period"). Excluded from the IPP Settlement Classes are the Defendants, their officers and directors, their direct and indirect parent and subsidiary corporations and their officers and directors; government entities; entities that purchased Terazosin Products for resale, to the extent of such purchases for resale; direct purchasers of Terazosin Products from Defendants, to the extent of such direct purchases; and indirect purchasers who suffered no economic injury as a result of Defendants' allegedly unlawful conduct.

"Third Party Payer" or "TPP" for these purposes means any entity that was (a) a party to a contract, issuer of a policy or sponsor of a plan, and was also (b) at risk, pursuant to such contract, policy or plan, to pay or reimburse all or part of the cost of Terazosin Products dispensed to

natural persons covered by such contract, policy, or plan. Entities with self-funded plans that contract with a health insurance company or other entity to serve as a third party claims administrator to administer their prescription drug benefits may qualify as TPPs. If such an entity's contract with its claims administrator does not shift the financial risk for the purchase of Terazosin Products from the entity to its claims administrator or otherwise assign the entity's rights in any recovery under this Settlement to its claims administrator, the entity with the self-funded plan (rather than the claims administrator) will be a TPP for purposes of this Settlement. Entities with self-funded plans should also be aware that any agreements that they may have with third party claims administrators may affect their ability to, or the terms under which such entities may, assert any claim against the Third Party Payer Settlement Fund, as well as the amount of any recovery to which such entity may be entitled. Entities with self-funded plans that maintain such contractual arrangements with third party claims administrators should review the terms of their administrative services agreements before making any claim against the Third Party Payer Settlement Fund to determine whether the entity or its third party claims administrator possesses the claim and/or has the right or obligation to assert the claim or the right to any or all proceeds that may be paid on the claim.

"Consumer" is any natural person who purchased and/or paid all or part of the purchase price of Terazosin Products during the Class Period.

"Plaintiff States" are the States of Colorado, Florida and Kansas.

III. BACKGROUND TO THIS LITIGATION

The Indirect Purchaser Plaintiffs' Complaints. Between 1999 and 2001, a number of Consumer Plaintiffs (including Martin Bernstein, Lavera Grosskrueger, David Grund, William Mednick, Albert J. Meyer, Willie O'Neal, and Victor Scafani) and TPP Plaintiffs (including Cobalt

Corporation (formerly known as United Wisconsin Services, Inc. and now known as Crossroads Acquisition Corporation), Blue Cross and Blue Shield of Alabama, and Blue Cross and Blue Shield of Michigan) (collectively, the "Indirect Purchaser Plaintiffs" or "IPPs") filed class action lawsuits against Abbott Laboratories ("Abbott"), and Geneva Pharmaceuticals, Inc. ("Geneva") (now known as Sandoz Inc.) (collectively "Defendants"), contending that between October 15, 1995 and August 1999, Defendants allegedly violated antitrust and consumer protection laws through conduct relating to the sale of Terazosin Products. The plaintiffs sought declaratory judgments, restitution for unjust enrichment, damages, and other equitable relief. Each of these cases is currently pending before the Honorable Patricia A. Seitz of the United States District Court for the Southern District of Florida, before whom the Judicial Panel on Multidistrict Litigation coordinated these actions in MDL No. 1317 on December 20, 1999. *In re Terazosin Hydrochloride Antitrust Litigation*, 2000 WL 33951466 (J.P.M.L. Dec. 20, 1999). In 2002, the IPPs filed their Fourth Amended Coordinated Class Action Complaints (the "IPP Complaints").

The Plaintiff States' Complaint. On September 27, 2001, the Plaintiff States filed a complaint against Defendants in the United States District Court for the Southern District of Florida on their own behalf, on behalf of certain state agencies, and through their statutory, equitable or common law authority or as representative of or *parens patriae* on behalf of natural person citizens of Florida and Kansas, contending that Defendants allegedly violated antitrust and consumer protection laws through conduct relating to the sale of Terazosin Products and seeking injunctive relief, civil penalties, damages, disgorgement, restitution and other equitable relief.

Class Certification. On September 4, 2001, the IPPs moved to certify various state classes of Consumers and Third Party Payers. On April 8, 2004, the Court entered an order ("Class Certification Order") certifying the fol-

lowing state-wide classes of indirect purchasers in Alabama, California, Florida, Illinois, Kansas, Maine, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, South Dakota, West Virginia, and Wisconsin:

> All persons and entities who or which have at any time from October 15, 1995 to June 30, 2002, paid all or part of the purchase price of Terazosin Products other than for resale, in the seventeen (17) states listed above or via mail for delivery to those same seventeen (17) states. Excluded from the state-wide classes were the Defendants, their officers and directors, their direct and indirect parent and subsidiary corporations and their officers and directors; government entities; entities that purchased Terazosin Products for resale, to the extent of such purchases for resale; direct purchasers of Terazosin Products from Defendants, to the extent of such direct purchases; and indirect purchasers who suffered no economic injury as a result of Defendants' allegedly unlawful conduct.

In re Terazosin Hydrochloride Antitrust Litigation, 220 F.R.D. 672 (S.D. Fla. 2004). On April 22, 2004, Defendants petitioned the United States Court of Appeals for the Eleventh Circuit for leave to appeal this decision pursuant to Fed. R. Civ. P. 23(f) and, on June 4, 2004, the Eleventh Circuit granted the petition. As of November 30, 2004, the briefs of the parties to the appeal were fully submitted. As of the date of this Notice, the Eleventh Circuit has not ruled on Defendants' appeal. The Court has, in addition to the previously certified seventeen (17) states, certified a Tennessee IPP Settlement Class in light of this Settlement (collectively, the 18 state classes are the "IPP Settlement Classes"), and extended the end date of the Class Period to March 7, 2005.

Summary Judgment. On April 26, 2004, IPP Plaintiffs and Defendants filed various Motions for Summary Judgment. On August 3, 2004, the Court heard oral ar-

gument on those motions. On August 31, 2004, the Court granted Defendants' motion and denied Plaintiffs' motions related to Plaintiffs' monopolization claims against Abbott under state laws analogous to Section Two of the Sherman Act. On January 5, 2005, the Court granted Plaintiffs' motion and denied Defendants' motions related to Plaintiffs' claims that Defendants had violated certain state laws analogous to Section One of the Sherman Act by entering into an agreement related to patent litigation between the Defendants. On February 9, 2005, Defendants filed a Petition for Writ of Mandamus with the United States Circuit Court of Appeals for the Eleventh Circuit. As of the date of this Notice, the Eleventh Circuit has not ruled on Defendants' petition.

Coordinated Discovery. Since 1999, the IPPs and Plaintiff States have cooperated in and coordinated their joint prosecution of claims for the benefit of the Consumers and Third Party Payers they respectively represent. They have conducted extensive economic and factual investigation relating to the claims, underlying events, and transactions alleged in the IPP Complaints and the Plaintiff States' Complaint (collectively, the "Complaints"), including review of in excess of a million pages of documents, the taking of more than fifty (50) depositions of defense and non-party witnesses, production of data by Plaintiffs, the giving of deposition testimony by various Plaintiffs, the consultation with expert witnesses and the taking of expert discovery, and extensive legal research on the applicable statutes and case law of the fifty (50) states and the District of Columbia.

Trial. On August 24, 2004, the Court ordered that the trial of all plaintiffs in MDL No. 1317 would proceed against the Defendants beginning April 11, 2005. On February 4, 2005, the Court ordered that, while the trial of other plaintiffs would proceed on April 11, 2005, trial of the IPPs and Plaintiff States would be postponed until the Eleventh Circuit ruled on Defendants' appeal from the Class Certification Order. On February 25, 2005, the

Court continued the trial of other plaintiffs' claims in light of provisional settlements of those claims.

IV. SETTLEMENT OF THESE CASES

In April 2004, the Court ordered that the parties to this litigation explore settlement through mediation with Professor Eric Green, an experienced and prominent mediator (the "Mediator"), while continuing with the litigation. With the help of Professor Green, the parties agreed to this Settlement, subject to approval of the Court and the terms and conditions of the Settlement Agreement and related documents. Throughout this process, arm's-length negotiations occurred among counsel for IPP Plaintiffs, the Plaintiff States and counsel for Third Party Payers to determine how the Net Settlement Fund would be allocated among Consumers and Third Party Payers.

Defendants deny each and every one of Plaintiffs' allegations of unlawful and inequitable conduct and Plaintiffs' entitlement to damages, restitution or any other legal or equitable relief in connection with Plaintiffs' claims and have asserted a number of defenses to Plaintiffs' claims which Defendants believe to be meritorious. While Defendants have agreed to settle the matter on the terms described herein, Defendants are prepared to litigate each of these matters vigorously if the Settlement is not approved. Defendants do not admit any wrongdoing by entering into this Settlement. If the Settlement is not finally approved by the Court, the Parties will resume litigating each of these cases, including the certification of the IPP classes, and there will be no assurance that any plaintiff or any member of the IPP classes can obtain a recovery.

The following description summarizes key terms of the Settlement. The Settlement Agreement is on file with the Court and can be reviewed as more fully described in Section IX.

The Settlement Agreement provides:

a. Settlement Funds. Defendants will collectively pay the sum of $30,700,000 as part of this Settlement. This amount, together with any interest earned thereon, constitutes the "Aggregate Settlement Fund." The Aggregate Settlement Fund, less Court-approved amounts paid for (1) a State Settlement Fund, (2) attorneys' fees and expenses incurred during the litigation, and (3) certain escrow agent fees associated with the Aggregate Settlement Fund (the "Net Settlement Fund") will be allocated to separate settlement funds for Consumers and Third Party Payers for (1) distribution to the members of the IPP Settlement Classes who or which file timely and valid Proofs of Claim, on the forms accompanying this Notice, containing the information requested therein, in accordance with the terms described below, (2) the costs of providing notice to the IPP Settlement Classes and administration of the Settlement, and (3) payment of incentive awards to Plaintiffs.

The Net Settlement Fund will be allocated as follows:

(1) The State Settlement Fund. The Attorney General of the State of Florida, as State Liaison Counsel, along with the Attorneys General of the States of Kansas and Colorado, have been involved in the investigation and litigation of this case for nearly five years. The State Settlement Fund is created to settle the claims of certain governmental entities and Attorney General-specific remedies, and state costs and fees. The State Settlement Fund totals $2,000,000, plus interest earned on that amount, to be paid from the Aggregate Settlement Fund. The Plaintiff States have worked for the benefit of agencies and consumers in this case. For these efforts, and subject to Court approval, the Plaintiff States, and primarily the State of Florida, as State Liaison Counsel, will ask to be reimbursed up to $1,625,000 from the State Settlement Fund for their fees and costs.

(2) IPP Attorneys' Fees and Expenses. IPPs' Co-Lead Counsel will apply for an award of attorneys' fees

not exceeding thirty percent (30%) of the Aggregate Settlement Fund less the State Settlement Fund. Such fees would be distributed among the law firms that have litigated cases on behalf of IPPs in MDL 1317 since 1999. In addition, IPPs' Co-Lead Counsel will apply for reimbursement of the accountable out-of-pocket expenses they have incurred in the prosecution of these cases since 1999, including expert witness fees and their respective shares of the fees of the Mediator. The application for accountable expenses will be for an aggregate amount not to exceed $2,000,000.

(3) Notice Costs. The costs of providing notice to the Consumer members of the IPP Settlement Classes will be paid from the Consumer Settlement Fund (described below). The costs of providing notice to the TPP members of the IPP Settlement Classes will be paid from the TPP Settlement Fund (described below).

(4) Incentive Awards. Certain named plaintiffs spent a significant amount of unreimbursed time and expenses litigating these cases for the benefit of the absent members of the IPP Settlement Classes. IPPs will seek awards of incentive fee payments to such plaintiffs in an amount not to exceed $120,000 for TPP Plaintiffs and $30,000 for Consumer Plaintiffs. Incentive awards for Consumer Plaintiffs will be paid from the Consumer Settlement Fund, and incentive awards for TPP Plaintiffs will be paid from the TPP Settlement Fund.

b. The Consumer Settlement Fund. Twenty-five percent (25%) of the Net Settlement Fund, the "Consumer Settlement Fund," shall be set aside to pay notice and administration costs of the Consumer Settlement Fund and incentive payments awarded to Consumer Plaintiffs, if any, with the balance of the Consumer Settlement Fund to be paid to satisfy the claims of Consumer members of the IPP Settlement Classes who file timely and valid Proofs of Claim. Payments to Consumer members of the IPP Settlement Classes will be based on the total amount of Terazosin Product purchases made in the 18 settlement

class states submitted in timely and valid Consumer Proofs of Claim. If the total amount of Terazosin Product purchases made in the 18 settlement class states claimed by Consumers exceeds the amount available for distribution to Consumer members of the IPP Settlement Classes, said members will receive their pro rata share of the Consumer Settlement Fund. If, after payment of (a) Court-approved costs of notice and administration, (b) any incentive payments awarded to Consumer Plaintiffs, and (c) 100% of valid and timely filed claims, monies remain in the Consumer Settlement Fund, any such remaining amount shall be paid to the TPP Settlement Fund, to the extent 100% of valid and timely filed Claims by TFP members of the TPP Settlement Classes remain unpaid.

c. **The Third Party Payer Settlement Fund.** Seventy-five percent (75%) of the Net Settlement Fund, the "Third Party Payer Settlement Fund," shall be set aside to pay notice and administration costs of the Third Party Payer Settlement Fund and incentive payments awarded to TPP Plaintiffs, if any, with the balance of the Third Party Payer Settlement Fund to be paid to satisfy the claims of TPP members of the IPP Settlement Classes who file timely and valid Proofs of Claim. Payments to TPP members of the IPP Settlement Classes will be based on the total amount of Terazosin Product purchases made in the 18 class states submitted in timely and valid TPP Proofs of Claim. If the total amount of Terazosin Product purchases made in the 18 class states claimed by TPPs exceeds the amount available for distribution to TPP members of the IPP Settlement Classes, said members will receive their pro rata share of the TPP Settlement Fund. If, after payment of (a) Court-approved costs of notice and administration, (b) any incentive payments awarded to TPP Plaintiffs, and (c) 100% of valid and timely filed claims, monies remain in the TPP Settlement Fund, any such remaining amount shall be paid to the Consumer Settlement Fund, to the extent 100% of valid and timely filed claims by Consumer members of the IPP Settlement Classes remain unpaid.

d. Distribution of Amounts Not Claimed. If, after payment of all (a) Court-approved costs of notice and administration for the Consumer Settlement Fund and the TPP Settlement Fund, (b) any incentive payments awarded to Consumer Plaintiffs and TPP Plaintiffs, and (c) 100% of valid and timely filed claims of Consumers and TPP, monies remain in either the Consumer Settlement Fund or the TPP Settlement Fund, the remaining amounts in either or both Settlement Funds shall be distributed as ordered by the Court.

e. Settlement Termination Contingency. Under certain circumstances relating, among other things, to Consumer and TPP class members who or which timely and validly exclude themselves from the IPP Settlement Classes, Defendants may terminate the Settlement, in which case the litigation will continue.

f. Release and Discharge of Claims. If the Settlement is finally approved by the Court and becomes effective, members of the IPP Settlement Classes who have not made valid and timely elections to exclude themselves from the IPP Settlement Classes, as well as their respective past, present and future directors, officers, employees, shareholders, attorneys, heirs, executors, administrators, general or limited partners, affiliates, divisions, agents, representatives, predecessors, parents, subsidiaries, agencies, departments, institutions, successors and assigns ("Releasors"), will unconditionally, fully and finally release and discharge forever the Defendants and their respective past, present and future directors, officers, employees, shareholders, affiliates, divisions, agents, representatives, attorneys, heirs, executors, administrators, predecessors, parents. subsidiaries, general or limited partners, successors, and assigns ("Releasees") of all claims, demands, debts, obligations, damages, civil penalties, whenever and wherever incurred, liabilities of any nature whatsoever (including costs, expenses, penalties and attorneys' fees), actions, suits, proceedings, assertions, and causes of action ("Claims"), known or unknown,

suspected or unsuspected, in law or inequity of any jurisdiction, including but not limited to Claims arising under any federal or state antitrust, unfair methods of competition, or consumer protection laws, under any state or federal deceptive practices acts, or under the common laws (including any theory of unjust enrichment) of any jurisdictions, whether accrued in whole or in part of any kind whatsoever, from the beginning of time through the date this Settlement Agreement is preliminarily approved by the Court, which any Releaser had, has, or may have in the future, directly, representatively, derivatively, or in any other capacity against any Releasee that were or could have been asserted by any Releasor (i) arising out of or concerning the allegations, or the facts and circumstances giving rise to the allegations in the Complaints or in any action consolidated as part of MDL No. 1317, or (ii) otherwise relating to any alleged delay in marketing or selling of generic equivalents of Terazosin Products, regardless of whether such claim was raised in the Complaints. Released Claims shall not be construed to include: (1) claims arising solely from and asserting damages based solely on an alleged physical injury; or (2) claims that may be asserted by any Releasor that do not arise from the facts, matters, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act set forth in the Complaints, or in any other complaint filed in any action that has been consolidated or coordinated with any of the Complaints, such as claims relating to the "best price" or "average wholesale price" reporting practices or to health care or Medicaid fraud or abuse.

Moreover, if the Settlement is finally approved by the Court and becomes effective, each member of the IPP Settlement Classes that has not made a valid and timely election to exclude itself from the IPP Settlement Classes will also be deemed to have expressly waived, released and forever discharged any and all provisions, rights and benefits that may be available under Section 1542 of the California Civil Code (**"Section 1542"**), which provides:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor"; or under any law of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, comparable or equivalent to Section 1542 (each a **"Comparable Law"**). Each Releasor may hereafter discover facts other than or different from those which he, she or it knows or believes to be true, but each Releasor hereby expressly waives and fully, finally and forever settles and releases, upon the Effective Date, any known or unknown, suspected or unsuspected, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Releasor also hereby expressly waives and fully, finally and forever settles and releases any and all claims it may have against any Released Party under California's Unfair Competition Law, § 17200, *et seq.*, of the California Business and Professions Code or any similar, comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction, which claims arc hereby expressly incorporated into the definition of Released Claims.

If the Settlement is finally approved by the Court and becomes effective, each member of the IPP Settlement Classes that has not made a valid and timely election to exclude itself from the IPP Settlement Classes shall look solely to the Consumer Settlement Fund or the Third Party Payer Settlement Fund, as appropriate, for settlement with and satisfaction of all claims that are released under the Settlement Agreement. Except as provided by order of the Court, no such member of the IPP Settlement Classes shall have any interest in either the Consumer Settlement Fund or the Third Party Payer Settlement Fund or any portion thereof.

V. COUNSEL FOR IPP SETTLEMENT CLASSES AND PLAINTIFF STATES

IPPs' Co-Lead Counsel, who prosecuted these actions and negotiated the Settlement Agreement with the Defendants on behalf of the members of the IPP Settlement Classes are:

Stephen Lowey, Esq.
Richard W. Cohen, Esq.
Geoffrey M. Horn, Esq.
Lowey Dannenberg
Bemporad & Selinger, P.C.
The Gateway, 11th Floor
One North Lexington Ave.
White Plains, NY 10601

Kimberly West, Esq.
Wallace Jordan Ratliff &
Brandt, LLC
800 Shades Creek Parkway
Suite 400
Birmingham, Alabama 35209

Michael Hausfeld, Esq.
Daniel Small, Esq.
1100 New York Ave. N.W.
West Tower, Suite 500
Washington, DC 20005

State Liaison Counsel, who prosecuted these actions and negotiated the Settlement Agreement with the Defendants on behalf of the Plaintiff States is:

Patricia Conners, Esq.
Office of the Attorney General
State of Florida
PL-01, The Capitol
Tallahassee, FL 32399-1050

VI. THE SETTLEMENT HEARING

The Court has scheduled a hearing to be held at _____.m. on **June 27, 2005**, at the United States Courthouse, Courtroom 5, 301 North Miami Avenue, 5th Floor, Miami, Florida 33128, to consider whether to approve the terms of the Settlement, the Consumer Distribution Plan and the Third Party Payer Distribution Plan, and the applications for fees and costs and for incentive awards. Although you may attend this hearing in person or through your own attorney, you are not required to do so. If you

wish to comment in support of, or in opposition to, the Settlement, you may do so, but you must mail your comments or objections in writing ***on or before April 11, 2005***, giving your name and current address. If you wish to be heard at the hearing in person or through your own attorney, you or your attorney must mail a written notice of appearance ***on or before April 11, 2005***. Any objections or notices of appearance must be mailed to: (1) The Settlement Administrator at In re Terazosin Hydrochloride Antitrust Litigation, c/o Complete Claim Solutions, Inc., P.O. Box 24607, West Palm Beach, FL 33416; (2) IPPs' Co-Lead Counsel listed in Section V above; and (3) Defendants at both addresses below:

Jeffrey I. Weinberger, Esq.
Stuart N. Senator, Esq.
Munger, Tolles & Olson, LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
Counsel for Defendant Abbott Laboratories

Wayne A. Cross, Esq.
Paul Olszowka, Esq.
White & Case
1155 Avenue of the Americas
New York, NY 10036
Counsel for Defendant Geneva Pharmaceuticals, Inc. (Sandoz Inc.)

VII. PROOFS OF CLAIM

In order to share in the proceeds of the Settlement and to receive a portion of the Net Settlement Fund, Third Party Payer members of the IPP Settlement Classes are required to complete (providing all requested information) and certify a Proof of Claim on the form accompanying this Notice, and mail it via first-class mail to the following address, ***postmarked no later than July 15, 2005***:

In re Terazosin Hydrochloride Antitrust Litigation
c/o Complete Claim Solutions, Inc.
P.O. Box 24607
West Palm Beach, FL 33416

VIII. YOUR RIGHT TO BE EXCLUDED FROM THE SETTLEMENT

(1) Any Third Party Payer member of the IPP Settlement Classes that wishes to be excluded from the Settlement for any reason is entitled to do so. The accompanying Third Party Payer Notice of Exclusion Form is provided for this purpose. **In order to be considered timely, it must be *received on or before April 11, 2005*, and mailed by first-class mail to:**

In re Terazosin Hydrochloride Antitrust Litigation
c/o Complete Claim Solutions, Inc.
P.O. Box 24607
West Palm Beach, FL 33416

Any member of the IPP Settlement Classes that elects to be excluded from the Settlement will not be entitled to participate in distributions from the Net Settlement Fund or in the Settlement generally, but will retain such rights, if any, it may have to prosecute separate litigation against Defendants at its own expense.

(2) Because of the settlement termination contingencies described in Section IV above, any member of the IPP Settlement Classes that elects to be excluded from the Settlement (an "Opt Out") will be requested to provide information concerning purchases of Terazosin Products. Failure to do so, or failure to provide information sufficient for the parties to determine what effect, if any, the Opt-Out's exclusion has on the termination contingencies may subject the Opt-Out to discovery via subpoena or other legal process.

IX. ADDITIONAL INFORMATION

You may review the Settlement Agreement and the Third Party Payer Distribution Plan during normal business hours at the office of the Clerk of Court, United States District Court for the Southern District of Florida, 301 North Miami Avenue, Room 150, Miami, Florida

33128. If you desire additional information, you may also write any of the IPPs' Co-Lead Counsel listed above in Section V, or telephone the Settlement Administrator at (877) 886-0283 or you may visit the website www.terazosirtlitigation.com.

PLEASE DO NOT CONTACT THE COURT, THE CLERK'S OFFICE, OR COUNSEL FOR DEFENDANTS FOR ADDITIONAL INFORMATION.

Dated: March 7, 2005

BY ORDER OF THE COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THIRD PARTY PAYER EXCLUSION FORM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: TERAZOSIN HYDROCHLORIDE)
ANTITRUST LITIGATION)
)

CASE NO. 99-MDL-1317-SEITZ/KLEIN

THIRD PARTY PAYER REQUEST FOR EXCLUSION

Third Party Payers that wish to be excluded from the IPP Settlement Classes must complete the following form and send it by first-class mail in time to be received no later than April 11, 2005 at the following address:

In re Terazosin Hydrochloride Antitrust Litigation
c/o Complete Claims Solutions, Inc.
P.O. Box 24607
West Palm Beach, FL 33416

A SEPARATE NOTICE OF EXCLUSION MUST BE FILED BY EACH CLASS MEMBER ELECTING TO BE EXCLUDED FROM THE CLASSES. If a Notice of Exclusion is filed on behalf of a Third Party Payer member of the IPP Classes by anyone other than a duly authorized officer, director, partner or employee of a Third Party Payer member of the IPP Classes, the Notice of Exclusion must be accompanied by written evidence, in addition to the Certification below, of such person's authority to request exclusion on behalf of that Class Member.

In order to elect to be excluded from the IPP Classes, you must provide the following information and complete the Certification:

1. Name of TPP Class Member[1]:

_____

2. TPP Class Member's Address: _____

_____

3. TPP Class Member Tax Identification Number ("FEIN")[2]:

Certification

The undersigned individual represents that he/she has the authority to sign end submit this Notice of Exclusion on behalf of the above-named Class Member. If the undersigned individual is not a duly authorized officer, director, or employee of the above-named Class Member (if a corporation), or a general partner or duly authorized employee of the above-named Class Member (if a partnership), he/she must attach written evidence of the Class Member's grant of authority to him/her to execute this Notice of Exclusion on its behalf.

The undersigned also certifies that he/she has not received any advice from the parties to this litigation concerning his/her or the Class Member's fiduciary obligations under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1100, *et seq.*, or other laws governing their obligations to any Class Member. The undersigned understands that by submitting this Notice of Exclusion, the Class Member identified above will not be bound by any further ruling of the Court and will not share in the Settlement. By affixing my signature below, I certify under penalty of perjury that the foregoing is true and correct. 28 U.S.C. § 1746.

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[1] Please include all names by which Class Member has been known since October 15, 1995.

[2] Please include all FEINs assigned to Class Member since October 15, 1995.

Name: _____

Legal Relationship to Class Member: _____

Contact/Telephone Number: _____

Signature: _____ Executed on: _____

The Parties request that each Third Party Payer Class Member electing exclusion from the Classes provide the following information: Amounts paid[3] in each of the 18 states for Hytrin® and/or generic terazosin hydrochloride during the period January 1, 1998, to December 31, 1999, based on records maintained by the Class Member:

THE INFORMATION PROVIDED WILL BE TREATED AS CONFIDENTIAL BY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA AND WILL BE USED SOLELY FOR PURPOSES OF ADMINISTERING THIS ACTION.

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[3] "Amounts paid" includes the total amount paid by the Third Party Payer members of the IPP Classes for Hytrin® and/or generic terazosin hydrochloride, whether paid directly to a pharmacy, through reimbursement to an insured, or otherwise. Third Party Payers may submit this information in an electronic format acceptable to the Settlement Administrator. For more information concerning the submission of electronic data, please contact the Settlement Administrator, Complete Claim Solutions, Inc., at the address and telephone number provided in the Notice.

Alabama:	California:	Florida:	Illinois:
Kansas:	Maine:	Michigan:	Minnesota:
Mississippi:	Nevada:	New Mexico:	New York:
North Carolina:	North Dakota:	South Dakota:	Tennessee:
West Virginia:	Wisconsin:		

Signature:_____ Date:_____

Print Name:_____ Title:_____

In re Terazosin Hydrochloride Antitrust Litigation
c/o Complete Claims Solutions, Inc.
P.O. Box 24607
West Palm Beach, FL 33416
1-877-886-0283
www.terazosinlitigation.com

IMPORTANT COURT DOCUMENTS

THIRD PARTY PAYER PROOF OF CLAIM FORM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: TERAZOSIN HYDROCHLORIDE)
ANTITRUST LITIGATION)
)

CASE NO. 99-MDL-1317-SEITZ/KLEIN

THIRD PARTY PAYER PROOF OF CLAIM FORM INSTRUCTIONS

IMPORTANT NOTICE: IN ORDER FOR THE THIRD PARTY PAYER ("TPP") CLASS MEMBER TO RECEIVE ITS SHARE OF THE TPP SETTLEMENT FUND, PURSUANT TO THE ALLOCATION AND DISTRIBUTION PLAN DESCRIBED IN THE NOTICE, A COMPLETED, SIGNED, AND CERTIFIED PROOF OF CLAIM MUST BE RECEIVED BY THE SETTLEMENT ADMINISTRATOR, AT THE ADDRESS LISTED BELOW:

In re Terazosin Hydrochloride Antitrust Litigation
c/o Complete Claims Solutions, Inc.
P.O. Box 24607
West Palm Beach, FL 33416
1-877-886-0283

IF YOUR COMPLETED, SIGNED CLAIM FORM IS NOT MAILED BY FIRST-CLASS MAIL, POSTAGE PREPAID, AND POSTMARKED BY JULY 15, 2005, YOU WILL NOT BE ALLOWED TO PARTICIPATE IN THE SETTLEMENT DISTRIBUTION.

THE COMPLETED CLAIM FORM AND THE INFORMATION CONTAINED HEREIN WILL BE TREATED AS CONFIDENTIAL BY ORDER OF THE COURT AND

WILL. BE USED SOLELY FOR PURPOSES OF ADMINISTERING THIS SETTLEMENT.

A Class Member must be a "Third Party Payer" or "TPP," which, for these purposes, means an entity that is (1) a party to a contract, issuer of a policy or sponsor of a plan, and is also (2) at risk, pursuant to such contract, policy or plan, to provide prescription drug benefits, or to pay or reimburse all or part of the cost of Terazosin Products dispensed to natural persons covered by such contract, policy or plan. Entities with self-funded plans that contract with a health insurance company or other entity to serve as a third party claims administrator to administer their prescription drug benefits may qualify as TPPs. If such an entity's contract with its claims administrator does not shift the financial risk for the purchase of Terazosin Products from the entity to its claims administrator or otherwise assign the entity's rights in any recovery under this Settlement to its claims administrator, the entity with the self-funded plan (rather than the claims administrator) will be a TPP for purposes of this Settlement. Entities with self-funded plans should also be aware that any agreements that they may have with third party claims administrators may affect their ability to, or the terms under which such entities may, assert any claim against the TPP Settlement Fund, as well as the amount of any recovery to which such entity may be entitled. Entities with self-funded plans that maintain such contractual arrangements with third party claims administrators should review the terms of their administrative services agreements before making any claim against the TPP Settlement Fund to determine whether the entity or its third party claims administrator possesses the claim and/or has the right or obligation to assert the claim or the right to any or all proceeds that may be paid on the claim.

This Proof of Claim may be completed, signed and certified by the Class Member itself, or by its duly authorized agent. IF A CLASS MEMBER SUBMITS A PROOF OF CLAIM ON ITS OWN BEHALF, NO OTHER PROOF OF

CLAIM WILL BE PERMITTED ON BEHALF OF THAT CLASS MEMBER. IN THE EVENT THAT PROOFS OF CLAIM ARE FILED BY BOTH A CLASS MEMBER AND ANOTHER ENTITY THAT PURPORTS TO BE THE AUTHORIZED AGENT OP THAT CLASS MEMBER, ONLY THE CLASS MEMBER'S PROOF OF CLAIM WILL BE CONSIDERED BY THE SETTLEMENT ADMINISTRATOR. **THE SETTLEMENT ADMINISTRATOR IS AUTHORIZED TO REQUEST FROM PERSONS OR ENTITIES SUBMITTING PROOFS OF CLAIM, ANY DOCUMENTATION NECESSARY TO VERIFY ALL INFORMATION APPEARING IN THE PROOF OF CLAIM OR TO PREVENT CONSIDERATION OF DUPLICATE CLAIMS SUBMITTED BY OR ON BEHALF OF A CLASS MEMBER. FAILURE TO PROVIDE SUCH INFORMATION IN RESPONSE TO SUCH REQUEST MAY CONSTITUTE GROUNDS FOR REJECTION OF THE PROOF OF CLAIM.**

If one or more Class Members has authorized you to submit a Proof of Claim on its or their behalf, you must provide the information requested in Section C in addition to the information requested by this Proof of Claim. You may submit a separate Proof of Claim for all each Class Member that has duly authorized you to do so, OR you may submit one aggregate Proof of Claim for all such Class Members that have authorized you to do so. If you are submitting Proofs of Claim both on your own behalf as a Class Member AND on behalf of one or more Class Members that has authorized you to submit a Proof of Claim, you should submit one Proof of Claim for yourself and another Proof of Claim for the other Class Member(s). **Do not submit a Proof of Claim on behalf of any Class Member without specific prior authorization from that Class Member.**

If after reviewing this Proof of Claim you need additional assistance, you may contact the Settlement Administrator at the toll-free number listed above.

THIRD PARTY PAYER PROOF OF CLAIM FORM

SECTION A – Type of Claimant: Please indicate whether you are claiming on your own behalf as a Class Member or as the authorized agent of one or more Class Members by placing an "X" in the appropriate space below. Only one space should be marked. **If you wish to make a claim as a Class Member AND ALSO as the authorized agent of other Class Members, please complete one Proof of Claim for your claim as a Class Member and another Proof of Claim for those Class Members for whom you are authorized to submit a claim.**

This Proof of Claim is being filed by: (select one)

A. (_____) The Class Member, itself.

B. The duly authorized agent of the Class Member(s) identified in Section C of this Proof of Claim, which agent's relationship with the Class Member(s) is best described, as follows:

(_____) Third Party Administrator (other than a Pharmacy Benefits Manager)

(_____) Pharmacy Benefits Manager

(_____) Other. Explain:_____

If you marked "A," complete Sections B, D and E of this Proof of Claim, but skip Section C. If you marked "B," complete Sections C, D and E of this Proof Claim, but skip Section B.

SECTION B – Claim by Class Member: You should complete this Section B if you are making a claim on your own behalf as a Class Member. If you are making a claim as the authorized agent of one or more Class Members, you should skip this section and proceed to Section C.

Class Member's Name

Street Address Floor/Suite

City State Zip Code

(____)_____ (____)_____

Area Code – Telephone No. Area Code – Fax No.

FEIN

Any other names by which you have been known or other FEINs you have used to pay prescription drug benefits from January 1, 1998 - December 31, 2004:

Check the term below that best describes your company/entity:

(_____) Health Insurance Company/HMO

(_____) Self-Insured Employer Health Benefit Plan

(_____) Self-Insured Union Health & Welfare Fund

(_____) Other. Describe:_____

If another entity, such as a Third Party Administrator or Pharmacy Benefits Manager, made payments or reimbursements on your behalf for Terazosin Products during the period from January 1, 1998 - December 31, 2004, provide the following information for each of those entities:

Name of Entity Making Payments for Terazosin Products on Your Behalf

Street Address Floor/Suite

City State Zip Code

( ) ( )
Area Code – Telephone No. Area Code – Fax No.

FEIN

SECTION C – Claim by Authorized Agent of Class Member(s): You should complete this Section C if you are submitting this Proof of Claim as the duly authorized agent of one or more Class Members.

Authorized Agent's Name

Street Address Floor/Suite

City State Zip Code

( ) ( )
Area Code – Telephone No. Area Code – Fax No.

FEIN

Please identify every Class Member for whom you have beat duly authorized to submit this Proof of Claim (attach additional sheets to this Proof of Claim as necessary). (In the alternative, you may submit such identification information in an acceptable electronic format. Please contact the Settlement Administrator to determine what formats are acceptable.):

_____ _____

_____ _____

_____ _____

SECTION D – Information Necessary to Calculate Class Member(s)' Claim:

Amounts paid or reimbursed for prescriptions of Hytrin and its AB-rated equivalents filled during the period January 1, 1998 through December 31, 2004, in the following states:

Alabama:	California:	Florida:	Illinois:
Kansas:	Maine:	Michigan:	Minnesota:
Mississippi:	Nevada:	New Mexico:	New York:
North Carolina:	North Dakota:	South Dakota:	Tennessee:
West Virginia:	Wisconsin:		

Claimant certifies that the figures submitted are true and accurate and based upon actual records maintained by or otherwise available to the Claimant.

SECTION E – Jurisdiction of the Court and Certification: By signing below, I hereby swear or affirm, on my own behalf and/or on behalf of the "Authorized Agent," that: (1) I have been given authority to submit this Proof of Claim either (a) by the Class Member on its behalf, or (b) if this Proof of Claim is submitted by an "Authorized Agent," by the Authorized Agent on its behalf, and such Authorized Agent, in turn, has been given the authority to submit this Proof of Claim by each Class Member identified in this Proof of Claim and in any attachments to this Proof of Claim, and to receive on behalf of each such Class

Member any and all amounts that may be allocated from the TPP Settlement Fund to such Class Member; (2) the information contained in this Proof of Claim and any attachments hereto is true and accurate, based on records maintained by or otherwise available to me; (3) I, the Authorized Agent (if any), and each Class Member on whose behalf this Proof of Claim is submitted, hereby submits to the jurisdiction of the United States District Court for the Southern District of Florida (the "Court") for all purposes associated with this Proof of Claim, including resolution of disputes relating to this Proof of Claim; (4) in the event that amounts from the TPP Settlement Fund are distributed to the Authorized Agent of a Class Member, and the Class Member later claims that the Authorized Agent did not have the authority to claim and receive such amounts on its behalf, the Authorized Agent, I and/or my employer will hold the Class, counsel for the Class, and the Settlement Administrator harmless with respect to any claims made by said Class Member. I acknowledge that any false information or representations contained herein may subject the Authorized Agent and me to sanctions, including the possibility of criminal prosecution. I hereby agree, on behalf of myself and the Authorized Agent, to supplement this Proof of Claim by furnishing documentary backup for the information provided herein, upon request of the Settlement Administrator.

SECTION F – ACKNOWLEDGMENT OF RELEASE OF CLAIMS: By signing below, I acknowledge that, if the Settlement is finally approved by the Court and becomes effective, members of the IPP Settlement Classes who have not made valid and timely elections to exclude themselves from the IPP Settlement Classes, whether or not they object to the Settlement Agreement and whether or not they make a claim upon or participate in any Settlement Fund (including both TPPs and Consumers, whether IPPs or not), as well as their respective past, present and future directors, officers, insurers, employees, shareholders, agents, attorneys, trustees, associates, gen-

eral or limited partners, affiliates, divisions, agents, representatives, predecessors, parents, subsidiaries, agencies, departments, institutions, successors and assigns ("Releasers"), will unconditionally, fully and finally release and discharge forever the Defendants and their respective past, present and future directors, officers, employees, agents, attorneys, shareholders, affiliates, divisions, agents, representatives, parents, subsidiaries, general or limited partners, insurers, and the predecessors, heirs, executors, administrators, successors, and assigns of each of the foregoing ("Releasees") of all claims, demands, debts, obligations, damages, civil penalties, whenever and wherever incurred, liabilities of any nature whatsoever (including costs, expenses, penalties and attorneys' fees), actions, suits, proceedings, assertions, and causes of action ("Claims"), known or unknown, suspected or unsuspected, in law or in equity of any jurisdiction, including but not limited to Claims arising under any federal or state antitrust, unfair methods of competition, or consumer protection laws, under any state or federal deceptive practices acts, or under the common laws (including any theory of unjust enrichment) of any jurisdictions, whether accrued in whole or in part of any kind whatsoever, from the beginning of time through the date this Settlement Agreement is preliminarily approved by the Court, which any Releasor had, has, or may have in the future, directly, representatively, derivatively, or in any other capacity against any Releasee (i) arising out of or concerning the allegations, or the facts and circumstances giving rise to the allegations in the Complaints or in any other complaint filed, consolidated or coordinated in MDL No. 1317, or (ii) otherwise relating to any alleged delay in marketing or selling of generic equivalents of Terazosin Products, regardless of whether such claim was raised in the Complaints. Released Claims shall not be construed to include: (1) claims arising solely from and asserting damages based solely on an alleged physical injury; or (2) claims that may be asserted by any Releaser relating to the "best price" or "average wholesale price" reporting

practices, or to health care or Medicaid fraud or abuse, except to the extent that such claims arise from the facts, matters, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act set forth in the Complaints, or in any other complaint filed in any action that has been consolidated or coordinated with any of the Complaints.

Moreover, if the Settlement is finally approved by the Court and becomes effective, each member of the IPP Settlement Classes that has not made a valid and timely election to exclude itself from the IPP Settlement Classes will also be deemed to have expressly waived, released and forever discharged any and all provisions, rights and benefits that may he available under Section 1542 of the California Civil Code (**"Section 1542"**), which provides: **"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor"**; or under any law of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, comparable or equivalent to Section 1542 (each a **"Comparable Law"**). Each Releasor may hereafter discover facts other than or different from those which he, she or it knows or believes to be true, but each Releasor hereby expressly waives and fully, finally and forever settles and releases, upon the Effective Date, any known or unknown, suspected or unsuspected, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Releaser also hereby expressly waives and fully, finally and forever settles and releases any and all claims it may have against any Released Party under California's Unfair Competition Law, § 17200, *et seq.*, of the California Business and Professions Code, or any similar, compara-

ble or equivalent provision of the law of any other state or territory of the United States or other jurisdiction, which claims are hereby expressly incorporated into the definition of Released Claims.

Name:_____ Position:_____
[Print or type]

Signature:_____ Date:_____

The following information is to be provided by the Individual that signs and certifies this Proof of Claim:

I am filing this Proof of Claim as the authorized employee of the following Class Member or Authorized Agent for Class Member:

1. _____
Name of Individual's Employer

2. _____
Business Address

_____
City State Zip Code

3. (___)_____
Area Code – Telephone No.

_____
Area Code – Fax No.

4. _____
E-mail address

NOTARIZATION OF CLAIMANT'S SIGNATURE:

STATE OF _____)

COUNTY OF _____)

Before me, the undersigned authority, a notary public in and for said County and State, personally appeared _____, who being known to me and being by me first duly sworn, deposed and testified as set forth above.

Sworn to and subscribed to before me this _____ day of _____, 200_.

_____
Notary Public

My commission expires:_____

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 6(b) provides:

Rule 6. Time

* * * * *

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

* * * * *

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

August 28, 2006

Mr. David C. Frederick
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Re: Blue Cross Blue Shield of Florida, Inc., et al.
v. Abbott Laboratories, et al.
Application No. 06A222

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on August 28, 2006 extended the time to and including October 5, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/ HEATHER TRANT
Heather Trant
Case Analyst

[attached notification list omitted]